Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

JOHN REINHARD III, JOHN REINHARD, and ELLEN REINHARD,

Petitioners,

v.

CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION; KEN TUOW, SUE BAKER, LAVONDA BURNETTE, MARY BUSHNELL, JUDITH ORTIZ, MARK ROYSTER, RUTH ROYSTER; and NEIL G. PEDERSEN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does a public school board's requirement that students perform charitable service to others in the manner prescribed by school officials violate the right of parents to direct the education of their children?

(2)(a) Is the Fourteenth Amendment right of parents to direct their children's upbringing and education fundamental?

(b) Are government laws or programs that violate this right subject to strict scrutiny, heightened scrutiny, or rational basis review?

(3) Does a government-imposed duty to perform charitable service to others violate a student's Fourteenth Amendment personal liberty guarantee?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Aric Herndon and his parents, Christiana and John Herndon, were plaintiffs in the original proceeding in district court and on appeal in the Fourth Circuit. The family subsequently has moved outside of the school district for reasons unrelated to this litigation. As a result, Aric Herndon's high school graduation is no longer jeopardized by the school district's requirement.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 89 F.3d 174 (4th Cir. 1996), and is reprinted in the Appendix. A-1-17. The opinion of the United States District Court for the Middle District of North Carolina is reported at 899 F. Supp. 1443 (M.D.N.C. 1995), and is reprinted in the Appendix. A-20-51.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered on July 11, 1996. The Order of the Fourth Circuit denying reconsideration and rejecting the suggestion for rehearing in banc (with three judges voting to rehear the case) was entered on August 28, 1996. A-18-19.

This Court has jurisdiction to review the judgment of the Fourth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, amendment XIV

SECTION 1. . . . [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

42 U.S.C. § 1983

Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or

causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT OF THE CASE

A. Statement of Facts

Starting with the graduating class of 1997, the Chapel Hill-Carrboro City Board of Education ("the school district") has required all students attending Chapel Hill High School to perform 50 hours of community service as a condition of graduation. A-58. To carry out this service, students must work at non-profit organizations and agencies. A-59. Students must perform at least two different types of service for a particular organization or agency. Clerical work and fundraising activities are limited to no more than eight hours each. *Id.*

The program is administered by the Service Learning Committee, comprised of teachers, students, and members of community organizations, which prepares a list of organizations from which students may choose to perform service. A-59. Such organizations include the Center for Peace Education, Habitat for Humanity, and the American Cancer Society. A-59, A-63-65. Students may suggest other organizations or agencies for which to perform their service. A-59.

Under the original requirements of the program, such student-initiated service had to be pre-approved by the

Service Learning Committee in order for students to gain credit. *Id.* Under revised guidelines implemented by the school district in October, 1994 (after the filing of the instant case), pre-approval is recommended, but not required, in order for students to have the opportunity to gain credit. A-59. Students may now perform the service first and then petition the Committee for credit. *Id.* Nevertheless, service organizations not on the pre-approved list must be approved by the Committee before students will receive credit. *Id.* A sample of the Committee's deliberations on student requests for service credit is included in the Appendix. A-66-67. Under prior guidelines, students could not acquire credit for work performed if that student received an independent benefit, such as an award or a Scouting merit badge. A-59. Under the October, 1994 guidelines, students may receive awards or badges for service and still receive credit under the program. *Id.*

Students must perform the service after school, on weekends or holidays, or over summer recess. A-58. Students set their own work schedules and must provide their own transportation; any training or necessary supervision of the students is provided by the organizations or agencies, not school personnel. A-60. Furthermore, students cannot receive compensation for service performed nor may service performed as part of court-ordered restitution count toward the mandatory number of hours. *Id.*

Students must turn in three documents to the school. A-60. First, when students arrive to perform their service, they must sign in with the organization and a contact person must document and verify the hours the student

works and the type of service the student performs. *Id.* Students must then turn over these verified time sheets to the school. *Id.* After performing the service, the student must on a separate form reflect on any special feelings or memories gained from a particular service experience. *Id.* Finally, after completion of the required 50 hours of service, students must submit a final report on their work experiences. *Id.*

Failure to complete the program as specified makes a student ineligible for graduation. A-60. The program makes no provision for students and their parents who object to mandatory community service to opt out of the program. *Id.*

Petitioner John Reinhard III is currently a student at Chapel Hill High School and subject to the mandatory community service requirement as a condition of graduation. A-61. In addition to attending school, he performed significant voluntary service to others before the school district imposed the community service requirement. A-55-57. He and his parents recognize the significance of private, voluntary charity, but believe that for the work to be meaningful, it must be private and motivated by a personal, voluntary concern for others. A-55-57, A-61. As such, he objects to forced participation in the school district's program. Moreover, as a result of the requirement, his impending high school graduation is in jeopardy. A-60.

John's parents, John and Ellen Reinhard, also object to their son's participation in the program. A-55-57, A-61. Like their son, the parents support charity, but fundamentally believe that their family, not the government,

must make decisions regarding charitable service. *Id.* They steadfastly attempt to impart these values to their children. *Id.*[1]

B. Proceedings Below

The families brought suit in the United States District Court for the Middle District of North Carolina on April 19, 1994. They challenged the program under Fourteenth Amendment guarantees of due process of law and privacy, and the Thirteenth Amendment's prohibition of involuntary servitude.[2] The district court had jurisdiction under 42 U.S.C. § 1983; 28 U.S.C. §§ 2201 and 2202; and 28 U.S.C. § 1331.

After a period of limited discovery, the parties agreed that there were no disputed issues of material fact and filed cross-motions for summary judgment together with Joint Stipulations of Material Fact. On July 19, 1995, the district court issued a memorandum, order, and judgment granting the school district's motion. A-20-51. Petitioners

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[1] For similar reasons as the Reinhards, the Herndon family, originally parties to the instant action, also objected to forced participation in the mandatory community service program. A-52-54, A-61. The Herndon family has long engaged in voluntary service. *Id.* Indeed, Aric Herndon received his Eagle Scout award at the age of 14, and performed hundreds of hours of service through the Boy Scouts, which at the time was ineligible for credit toward the mandatory community service requirement. A-52-53. As mentioned previously, the Herndons have subsequently moved from the school district for reasons unrelated to this litigation.

[2] The Reinhards limit this petition to Fourteenth Amendment parental and personal liberty guarantees.

filed a timely notice of appeal to the United States Court of Appeals for the Fourth Circuit and, on July 11, 1996, the Court entered a judgment and opinion affirming the district court's judgment. A-1-17.

The families filed with the Fourth Circuit a Petition for Rehearing and Suggestion for Rehearing In Banc. The Court, on February 14, 1996, denied the petition and rejected the suggestion for rehearing in banc. A-18-19. A member of the Fourth Circuit requested a poll on the suggestion for rehearing in banc. *Id.* A majority of the judges voted to deny rehearing; three judges voted to rehear the case. *Id.*

REASONS FOR GRANTING THE WRIT

I. A SEVERE SPLIT IN AUTHORITY EXISTS OVER WHETHER PARENTAL LIBERTY IS A FUNDAMENTAL RIGHT.

A. Overview

One of the most widely acknowledged and well-established rights at common law and at the founding of this country was the right of parents to direct and control the upbringing and education of their children. With the advent of compulsory education laws, parents surrendered some degree of authority over their children's education to the government. However, courts recognized during the earlier part of this century – culminating in this Court's *Meyer-Pierce-Farrington* trilogy of cases – that state provision and regulation of education did not eviscerate parental rights. Rather, an important balance was

struck between parental and governmental authority over educational matters.

Today, this balance has severely eroded. By compelling students to perform service to non-profit organizations and agencies, the school district in the instant case has taken a profoundly significant step beyond its traditional role. It is not alone; a growing number of governmental bodies – in the name of perceived societal needs – insist on taking over responsibilities that until recently have been left to parents. Moreover, public schools have begun to require activities, such as "mandatory volunteering," with little or no connection to the traditional school curriculum.[3] Understandably, many parents are upset about these creeping intrusions into the family

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[3] This Court has indicated that school board decisions concerning the curriculum of a public school generally are accorded deference. *See, e.g., Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982). The normal deference afforded the traditional school curriculum, however, should not extend to functions or requirements that take place outside of the classroom and especially to activities that take place outside the school itself, a time when minors are under the exclusive authority of their parents. In the instant case, the required community service is not even a part of "the curriculum." It is an extracurricular duty that is unconnected to the classroom. Moreover, unlike other school requirements, school officials do not supervise any of the service. A-58, A-60. Even this Court recognized in another context that community service could not be characterized as part of the traditional public school curriculum. *See Board of Educ. of Westside Com. Schools v. Mergens*, 496 U.S. 226, 240 (1990) (community service club considered "non-curriculum student group").

domain and have begun again demanding recognition of parental rights. *Id.*

Amidst this increasing tension between governmental and parental authority, the law surrounding Fourteenth Amendment parental liberty rights is ambiguous and conflicting. Although some recent decisions affirm the right of parents to direct their children's education as fundamental, other courts, including the Fourth Circuit in the instant case, characterize parental liberty as a non-fundamental right. This holding applies equally to parents who educate their children at home or send them to private schools, in addition to children who attend the public schools. The primary effect of this ruling is to leave parents virtually powerless when governmental programs and regulations intrude into areas traditionally entrusted to family autonomy. This case presents a timely opportunity for this Court to resolve the uncertainty in the law and to restore much-needed balance between government prerogatives and parental rights.

Petitioners, John and Ellen Reinhard, typify parents throughout the country concerned about increased government intrusion into areas that had been left to family decision-making. The Reinhards believe that their family alone should determine whether and under what circumstances they and their children will perform charitable service to others. The parents support private charity and voluntary service to the community, but they believe that performing charity is a deeply personal matter that must remain between themselves and the recipients of their

service, free from government oversight and coercion. *See* A-55-57, A-61.[4]

As the following sections set forth, recognition of parental liberty as a fundamental right strikes the proper balance between the state's interest in fulfilling educational goals and the ability of the Reinhards and all parents to direct their children's education. Petitioners respectfully ask this Court to resolve the ambiguity and conflict in the law concerning parental rights; to reject the rational basis test as the appropriate standard; and to affirm as fundamental the right of parents to direct the upbringing and education of their children under the

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[4] Keeping volunteering in the realm of individual initiative and personal conscience has deep roots in our heritage and in many religious teachings. *See, e.g.*, Alexis de Tocqueville, *Democracy in America* 287 (J.P. Mayer ed. 1969) (discussing America's grand tradition of voluntarism and private charitable efforts in creating "habits of the heart"); James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) (opposing all forms of mandatory tithing, whether it be to religious or educational institutions), quoted in *Everson v. Board of Education of Ewing Twp.*, 330 U.S. 1, 35-37 (1947) (Rutledge, J., dissenting); *see also Matthew* 6: 1, 3-4 (New King James Version) ("Take heed that you do not do charitable deeds before men, to be seen by them. . . . But when you do a charitable deed, do not let your left hand know what your right hand is doing, that your charitable deed may be in secret"); Ephraim E. Urbach, *The Sages: Their Concepts and Beliefs* (1987) (discussing importance of charity in Tannaim and Amoraim Jewish teachings); *The Koran*, S. iv. 114 ("if one exhorts to a deed of charity . . . [s]ecrecy is permissible, to him who does this seeking the good pleasure of God, we shall soon give a reward of the highest value"). Furthermore, the venerable institution of "anonymous" charitable giving is yet further evidence of the voluntary and private charitable spirit that flourishes so well in this country.

Fourteenth Amendment. At the very least, this Court should subject laws and programs that violate parental rights to heightened scrutiny.

B. Since *Meyer* and *Pierce* Were Decided Before This Court's Modern Two-Tier Approach To Analyzing Constitutional Rights, Courts Are Uncertain And Have Split Over the Proper Level of Scrutiny Applicable To Laws That Violate Parental Rights.

The right of parents to direct and control the upbringing and education of their children is firmly established in our constitutional heritage and guaranteed by the Fourteenth Amendment to the U.S. Constitution. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 293 U.S. 284 (1927); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Carey v. Population Services*, 431 U.S. 678 (1977). As the Fourth Circuit recognized in its opinion, however, this Court has not addressed specifically Fourteenth Amendment parental liberty rights "standing alone" for decades, thus leading to ambiguity in the law and conflicts in federal and state courts. *See* A-10.

The First Circuit also recently has recognized the ambiguity in the *Meyer-Pierce* line of cases:

> The *Meyer* and *Pierce* cases were decided well before the current "right to privacy" jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those rights whose infringement merits heightened scrutiny.

Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 533 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 1044 (1996); *see also Blackwelder v. Safnauer*, 689 F. Supp. 106, 136 (N.D.N.Y. 1988) ("[t]he degree of judicial scrutiny to be applied to a governmental action that interferes with the privacy interests recognized in *Pierce* and *Meyer* . . . is not clear to this court").

Moreover, constitutional scholars also acknowledge the uncertainty surrounding the nature of parental liberty rights. *See, e.g.*, Laurence H. Tribe, *American Constitutional Law* 1414-23 (2d ed. 1988); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.7 (4th ed. 1991) (contrasting various levels of scrutiny applied by this Court and lower courts to parental liberty claims); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937, 937-944, 1003-06 (1996) (hereinafter "Gilles"); Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 Georgia L. Rev. 975 (1988).

The lack of clear guidance concerning the nature of Fourteenth Amendment parental liberty rights has led to conflicts among courts. For instance, the Fourth Circuit's holding that parental liberty is a non-fundamental right directly conflicts with two recent important cases concerning the rights of parents in the public school context. Last year, the Supreme Judicial Court of Massachusetts held that "parents possess a fundamental liberty interest, protected by the Fourteenth Amendment, to be free from unnecessary intrusion in the rearing of their children." *Curtis v. School Committee of Falmouth*, 652 N.E.2d 580, 584-86 (Mass. 1995), *cert. denied*, 116 S.Ct. 753 (1996) (recognizing parental liberty as a fundamental right but

rejecting parental challenge to condom distribution program in the public schools); *accord Alfonzo v. Fernandez*, 606 N.Y.S.2d 259, 265-67 (1993), *appeal dismissed without op.*, 614 N.Y.S.2d 388 (1994) (striking down condom distribution program in the public schools on Fourteenth Amendment parental liberty grounds and recognizing parental liberty as a fundamental constitutional right). The courts in Massachusetts and New York based their conclusions on this Court's decisions in *Meyer*, *Pierce*, and *Prince*.

The conflict in interpreting Fourteenth Amendment parental liberty rights is evident in the rulings of other courts as well, and even among decisions of the same court. *Compare, e.g., Michigan v. Bennett*, 501 N.W.2d 106 (Mich. 1993) (finding the right to direct the education of children to be a non-fundamental right) *with Dep't of Social Services v. Emanuel Baptist Preschool*, 455 N.W.2d 1 (Mich. 1990) (Cavanagh, J.) (finding the right to direct the education of one's children to be fundamental) and *Sheridan Rd. Baptist Church v. Dep't of Ed.*, 396 N.W.2d 373 (1986) (Riley, J.) (same); *compare Jordan by Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994) (emphasis added) ("[t]here are few rights more *fundamental* in and to our society than those of parents to rear their children as they deem appropriate") *with Herndon v. Chapel Hill-Carrboro Cty. Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996) (rejecting parental liberty as a fundamental right in challenge to mandatory service program); *see also Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) (parental liberty is a non-fundamental right in the equal protection context); *Ohio v. Whisner*, 351 N.E.2d 750, 769 (Ohio 1976) (emphasis added) ("it has long been recognized that the right of a parent to guide

the education . . . of his or her children is indeed a *'fundamental right'* guaranteed by the due process clause of the Fourteenth Amendment"); *Immediato v. Rye Neck School Dist.*, 73 F.3d 454 (2d Cir), *cert. denied*, 117 S.Ct. 60 (1996) (declaring parental liberty to be a non-fundamental right in similar challenge to mandatory service program); *Hutchins v. District of Columbia*, (U.S.D.C. D.C., October 29, 1996) (recognizing parental right to direct children's upbringing as fundamental in striking down curfew ordinance).

Faced with a conflicting legal landscape, the Fourth Circuit chose to characterize parental liberty rights as "non-fundamental" and subject to rational basis review.[5] The Fourth Circuit acknowledged, however, that it was relying merely on dicta in decisions from this Court regarding parental rights. *See* A-10. Petitioners urge this Court to review the Fourth Circuit's holding, resolve the

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[5] Contrary to the Fourth Circuit's holding in the instant case (A-8-9), *Meyer* and *Pierce* do not stand for the proposition that parental rights are subject to rational basis review. Both cases use the term "reasonable," but the cases were decided over a decade before this Court established its current standards of review in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (setting forth modern rational basis review and fundamental rights/strict scrutiny analysis). Rather, the cases stand for the proposition that governmental bodies "may not pursue legitimate educational ends by means whose primary effect is to override the reasonable educational choices of parents." Gilles, 63 U. Chi. L. Rev. at 1006; *see also Farrington*, 273 U.S. at 298 (striking down state regulation of supplemental foreign-language schools that denied parents "reasonable choice and discretion in respect to teachers, curriculum and text-books").

ambiguity in the law, and affirm parental liberty as a fundamental constitutional right.

C. A Solid Basis In The Law Exists for Recognizing and Affirming Parental Liberty As A Fundamental Right.

Parental liberty rights have a rich constitutional pedigree, and a firm foundation exists in the law for acknowledging such rights as fundamental.[6] Despite the lack of recent cases specifically addressing this issue, earlier decisions of this Court have established parental liberty as "essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. Furthermore, parental liberty is a basic value "implicit in the concept of ordered liberty," thus meriting recognition of fundamental status. *See Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

Adding more authority for recognizing parental rights as fundamental, this Court has consistently recognized parental liberty rights – and *Meyer* and *Pierce* – into decisions involving other fundamental privacy rights recognized under the Fourteenth Amendment. *See, e.g., Griswold*, 381 U.S. at 483 (incorporating "the principle of *Meyer* and *Pierce*"); *Ginsburg v. New York*, 390 U.S. 629, 639 (1968) (childrearing is "basic in the structure of our society"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating that family rights and childrearing are fundamental rights);

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[6] *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 293 U.S. 284 (1927); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Kelly v. Johnson, 425 U.S. 238, 244 (1976) (equating *Meyer* parental liberty rights to those rights recognized in *Roe* and *Griswold*); *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 881 (1990) (equating "right of parents . . . to direct the education of their children" with "freedom of speech and of the press"); *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 848 (1992) (most recent affirmation of parental liberty rights and *Meyer* and *Pierce*).[7]

Indeed, in *Casey*, 505 U.S. at 851, this Court held that within the sphere of protected individual liberties are "personal decisions relating to marriage, . . . family relationships, childrearing, and education." *Id.* The Fourth Circuit's cavalier dismissal of parental liberty as a non-fundamental right flies in the face of *Casey*'s pronouncement concerning the fundamental nature of parental rights as they relate to childrearing and education.[8]

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[7] As one commentator recently noted:

> Although the Supreme Court has not had the opportunity to declare parents' rights to guide the education of their children as fundamental under its current analysis, early Court decisions found such rights to be essential. Moreover, the Court has stated in dicta that the right is fundamental. . . . Thus, parents' right to guide the education of their children may be fundamental.

Daniel J. Rose (Note), *Compulsory Education and Parent Rights: A Judicial Framework of Analysis*, 30 Boston Col. L. Rev. 861, 863 (1989).

[8] While the recognition of non-textual rights is a treacherous area, all members of this Court agree that such rights exist. *See Casey*, 505 U.S. at 848-49, 951-52, 981 (plurality and dissenting opinions). The essential disagreement is whether

The right of parents to have primary responsibility over the education of their children was well established at common law. *See* Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. Rev. 606, 615 ("[t]he common law has long recognized parental rights as a key concept, not only for the specific purposes of domestic relations law, but as a fundamental assumption about the family as a basic social, economic, and political unit"); John Locke, *An Essay Concerning the True Original Extent and End of Civil Government*, ¶¶ 67, 69 (Great Books ed. 1991) (noting that parents may employ teachers but ultimate authority over children lies with parents). Both prior to and after the adoption of compulsory school attendance laws, courts also recognized that the common law right of parents to direct their children's education extended to having their children excused from certain programs to which they objected within the public schools.[9]

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a claimed right is consistent with, or antagonistic to, the recognized traditions, laws, and background principles underlying the Constitution and our republic as a whole. *See Bowers v. Hardwick*, 478 U.S. 186, 192-95 (1985). As discussed *infra*, the long-standing decisions of this Court and the background principles of common law indicate that parental rights, though non-textual, are encumbered with none of the difficulties that leave others highly controversial.

[9] *See, e.g., Morrow v. Wood*, 35 Wis. 59 (1874) (child excused from required geography lessons due to parental objection); *Rulison v. Post*, 79 Ill. 567 (1875) (child excused from bookkeeping class); *School Board v. Thompson*, 103 P. 578 (Okla. 1909) (parent successfully objected to required singing lessons in the public schools); *Hobbs v. Germany*, 49 So. 515 (Miss. 1909) (child exempted from school requirement that homework be

With the advent of compulsory education, courts sought to balance the state's interest in education against parents' long-recognized common law right to direct their children's education, a balance sorely lacking in many modern education decisions:

> The public school is one of the main bulwarks of our nation and we would not knowingly do anything to undermine it; but we should be careful to avoid putting our love of this noble institution to cause us to regard it as "all in all" and destroy the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children. . . . [W]e want to be careful lest we carry the doctrine of government paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home. . . . [School authorities] should not too jealously guard or attempt to defend their supposed prerogatives.

Ferguson, 144 N.W. at 1043-44; *see also Stanley*, 255 P. 613-14 ("the right of parents to select, *within limits*, what their children shall learn is one of the liberties guaranteed by

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done at certain times); *State v. Ferguson*, 144 N.W. 1039 (Neb. 1914) (successful parental objection to music class); *Hardwick v. Board of School Trustees*, 205 P. 49 (Cal. App. 1921) (student exempted from dancing instruction on parental objection); *People ex rel. Vollmar v. Stanley*, 255 P. 610 (Colo. 1927) (child excused from study of biology); *see also* Mary-Michelle Upson Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction?*, 50 Southern Cal. L. Rev. 871, 886-97 (1977) (hereinafter "Hirschoff"); Joel S. Moskowitz, *Parental Rights and State Education*, 50 Wash. L. Rev. 623, 636-43 (1975).

the Fourteenth Amendment to the national Constitution") (emphasis added). Although parental rights were considered paramount, common law decisions established two important limits on parental rights in the public schools. First, students could not be exempted from classes deemed the "essentials of good citizenship." Hirschoff, 50 Southern Cal. L. Rev. at 886. Furthermore, parents could not exercise their rights in a manner that adversely affected the rights of other parents and students. *Id.*

Early common law cases recognizing and enforcing the right of parents to direct their children's education, including the right of parents to have some degree of authority while their children attended public schools, were the basis for the landmark *Meyer, Pierce,* and *Farrington* decisions. *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Societal Interests,* 81 Mich. L. Rev. 473, 572 (1983) ("[w]hen the Court in 1923 first recognized that the right of parents to direct the upbringing of their children was part of the substantive liberty protected by the due process clause, it did not create a new legal right out of whole cloth. It merely acknowledged in constitutional language the traditions . . . that predated the Constitution"); *see also* Hirschoff at 897.

In addition to respecting parental rights in the public school setting, the common law also explicitly recognized that parental liberty is worthy of fundamental status because it represents protection of an institution of the

utmost importance to our society: the family.[10] As this Court has stated, "the sanctity of the family . . . is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977).

Accordingly, the right of parents to direct the upbringing and education of their children should likewise be affirmed as fundamental, and violations of this right should be subject to strict scrutiny. If this Court is unwilling to apply strict scrutiny, the respect accorded by this Court and others to parental rights, the traditions of this nation, and the background principles of common law justify at least heightened or intermediate scrutiny.

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[10] While the First Amendment protects the right of individuals, including parents, to freely exercise their religious beliefs, the Fourteenth Amendment protects the autonomy of the family and guarantees the right of all parents to direct their children's education, including such matters as "the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Curtis*, 652 N.E.2d at 585 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)). The Fourth Circuit mistakenly relied on another passage in *Yoder*, 406 U.S. at 215-16, for its contention that non-religious objections to the public school curriculum receive rational basis review. *See* A-14. The *Yoder* decision was primarily a free exercise case that mentioned Fourteenth Amendment parental liberty rights in the context of guiding children's *religious* upbringing. Ronald D. Rotunda, John E. Nowak, & J. Nelson Young, *Treatise on Constitutional Law: Substance and Procedure* § 21.8 n.9 (1991 ed.). The passages from *Yoder* relied on by the Fourth Circuit in its decision merely reinforce the requirement that free exercise claims must be religiously based in order to receive the protection of the First Amendment. They do not address in any way Fourteenth Amendment parental liberty rights.

As discussed *infra*, adoption of rational basis review would make intrusive educational laws or programs virtually unreviewable and entirely undermine the ability of parents to direct their children's education.

D. Rational Basis Review Will Leave Parental Rights Unprotected.

Classification of Fourteenth Amendment parental liberty rights as non-fundamental and adoption of rational basis review for parental liberty claims would render immune from parental challenge virtually any regulation or requirement imposed on public, private, or home schools. Under rational basis review, a law must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis" for the law. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). In reality, such review "is tantamount to no review at all." *Id.* at 323 n.3 (Stevens, J., concurring); *see also* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §§ 11.4, 14.3 (4th ed. 1991) (discussing extremely lax rational basis review standard).

Any educational requirement or regulation, no matter how onerous and invasive of parental rights and prerogatives, could be justified as furthering *some* "rational" educational objective. Forcing students to participate in political street demonstrations, violent sports activities, dissection of animals, or graphic demonstrations of birth control techniques all could be explained as satisfying the educational goals of learning about the political process, competition, science, and human sexuality.

Under rational basis review, parents would be left without recourse. Moreover, parents who educate their children at home would face similar intrusive government oversight, and likewise have little recourse but to abide by the requirements. Under rational basis review, there really are no limits on what could be required of young people in the name of education, regardless of their parents' objections.[11]

The constitutionality of public school programs and state regulation of private and home schooling should not be sustained merely by asserting valid or "rational" educational interests and declaring that the program furthers those interests, for such a standard drains parental liberty rights of all vitality. This view clashes with both the decisions of this Court and our nation's recognition of the primary role of the family and parents in the upbringing and education of children. Accordingly, this Court should reject rational basis review as the appropriate standard when state authority violates parental rights, and assure that parental rights are afforded at the very least heightened protection under the Fourteenth Amendment.

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[11] Indeed, the requirements struck down in *Meyer* and *Pierce* were justified on the basis of furthering such valid educational purposes as promoting good citizenship values, and most likely would have been upheld if subject to modern rational basis review. *See Meyer*, 262 U.S. at 398; *Pierce*, 268 U.S. at 517.

II. THE INCIDENCE OF COMPULSORY STUDENT SERVICE PROGRAMS IS A GROWING NATION-WIDE PHENOMENON, REQUIRING JUDICIAL CLARIFICATION OF APPLICABLE CONTITUTIONAL LIMITS.

Disputes over mandatory community service are likely to grow in coming years. Currently, it is estimated that approximately 8 percent of all public school districts have a mandatory service program, and other school districts are considering adopting service requirements. George Basler, *Volunteer Credit a Trend In Schools*, PRESS & SUN BULLETIN, December 14, 1994 (citing statistics provided by Learn & Serve America). Indeed, President Clinton in a recent speech urged all public middle and high schools to mandate volunteering as a graduation requirement. Susan Page, *Clinton: Let's Reward Community Service*, USA TODAY, March 10-12, 1996. This phenomenon uproots deeply entrenched rights and traditions.

The Fourth Circuit held that the "decision to serve one's community is important, but it is not so 'intimate and personal' that it merits Fourteenth Amendment protection." A-13. Although this Court has certainly protected "intimate and personal" decisions from government interference, it has also recognized that fundamental rights are those personal freedoms "implicit in the concept of ordered liberty,"[12] or "deeply rooted in this Nation's history and traditions."[13]

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[12] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds, Benton v. Maryland*, 395 U.S. 784 (1969).

[13] *Moore v. City of East Cleveland*, 431 U.S. at 503.

One would be hard pressed to find a freedom more deeply rooted in this nation's history and traditions than that of individuals deciding for themselves whether and under what circumstances to perform acts of charity. Over 150 years ago, Alexis de Tocqueville marvelled at how American volunteers and private associations performed functions that in other countries were assumed by the government.[14] This remarkable tradition of good will has been accomplished through individuals translating their own values and beliefs into action by voluntarily lending a hand to others.[15]

The school district in this case, like a growing number of school districts, has taken this tradition of conscience and voluntary charity and turned it into a high school graduation requirement; self-motivation and inspiration are now replaced by compulsion. The school district's program clashes with the centuries-old tradition that the decision to provide charitable service to others – to volunteer – must come from an individual's conscience, not from a state-imposed obligation. That is why the colloquial expression for the school district's program – "mandatory volunteering" – sounds so strange, so oxymoronic.

Petitioners urge this Court to recognize that within the range of personal freedoms protected by the

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[14] *See* de Tocqueville, *supra*, note 5.

[15] *See also* note 5, *supra* (discussing this country's tradition of private charity and voluntarism in serving others).

Fourteenth Amendment must be the right to determine whether an individual wishes to perform charitable service to others. Until the imposition of mandatory community service requirements, governments never had imposed such duties on individuals.[16]

The school district's "mandatory volunteering" program not only contradicts this Nation's history of voluntarism, it also violates the long-established common law principle of refusing to transform what many would consider a moral duty (service to others) into a legal requirement. The common law "has always refused to transmute moral duties into legal duties." Charles O. Gregory, "The Good Samaritan and the Bad: The Anglo-American Law," in *The Good Samaritan and the Law* 23 (J. Ratcliffe, ed. 1966). Indeed, noted common law scholar Francis H. Bohlen concluded that "there is no distinction more deeply rooted in the common law and more fundamental than that between . . . active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others." Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. Penn. L. Rev. 217, 219 (1908).

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[16] Requiring public high school students to perform service to others has no historical or common law antecedent and is of recent origin. The move toward mandating community service as a public high school graduation requirement arose mostly in the early 1980s and was largely spurred by a policy group advocating mandatory service. *See* Ernest L. Boyer, *High School: A Report on Secondary Education* (1983).

The common law "does not compel active benevolence between man and man. It is left to one's conscience whether he shall be a Good Samaritan or not." James Barr Adams, *Law and Morals*, 22 Harv. L. Rev. 97, 112 (1908). Moreover, "[t]he laissez-faire approach of the common law restrained men from committing acts of affirmative harm but did not make the government an agency for forcing men to help each other." Harold F. McNiece & John V. Thornton, *Affirmative Duties in Tort*, 58 Yale L. J. 1272, 1288 (1949). In surveying Anglo-American legal doctrine, Bohlen also concluded that "no support can be derived from it for the contention that the law has recognized as a legal duty the moral, ethical, and humanitarian obligation to aid the unfortunate." Bohlen, *id.*

The school district's program, however, in contravention of this legal tradition, obligates students to undertake the direct provision of service to approved nonprofit organizations and agencies in the community. *See* A-59. By requiring individuals to perform service to others, the school district violates a fundamental tenet of Anglo-American law concerning the legal obligations individuals owe to others.

Consequently, petitioners do not seek creation of a new constitutional right, but merely seek recognition of a privilege "long recognized at common law as essential to the orderly pursuit of happiness by free men." *See Meyer*, 262 U.S. at 399; *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977) ("[t]he Due Process Clause . . . was intended to give Americans at least the protection against governmental power that they had long enjoyed as Englishmen against the power of the Crown"); *Michael H. v. Gerald D.*,

491 U.S. 110, 121-25 (1989) (exploring common law to determine substantive due process guarantees).[17]

The decision to serve others was left to individual decision-making at common law and throughout our Nation's history, and this freedom is one of the foundations of a free, civil, and voluntary society; it should be protected under the Constitution. Accordingly, petitioners respectfully ask this Court to recognize that the decision to serve others – a long standing privilege usurped by the school district in this case – is entrusted by the Fourteenth Amendment's personal liberty guarantee to the realm of individual decision-making.

CONCLUSION

This Court has declared that the very purpose of the Constitution is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The instant case is an example of a governmental body simply going too far, compelling actions that under the common law and the U.S. Constitution must be entrusted to family decision-making and individual conscience. Petitioners

[17] Significantly, this Court has examined common law guarantees to determine the extent of protections afforded public school students. In *Ingraham*, 430 U.S. at 660-63, for instance, this Court rejected constitutional restraints on corporal punishment in the public schools because the common law both permitted such punishment and provided remedies to students when the punishment was excessive.

respectfully urge that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ARIC HERNDON, a minor, by Christiana and John HERNDON, as Guardians; CHRISTIANA HERNDON, as Guardian of Aric Herndon, a minor, and in her own right; JOHN HERNDON, as Guardian of Aric Herndon, a minor, and in his own right; JOHN REINHARD, III, a minor, by John and Ellen Reinhard, as Guardians; JOHN REINHARD, as Guardian of John Reinhard III, a minor, and in his own right; ELLEN REINHARD, as Guardian of John Reinhard III, a minor, and in her own right,

Plaintiffs-Appellants,

v.

CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION; KEN TOUW, in his official capacity as member of the Chapel Hill-Carrboro City Board of Education; SUE BAKER, in her official capacity as member of the Chapel Hill-Carrboro City Board of Education; LAVONDA BURNETTE, in her official capacity as member of the Chapel Hill-Carrboro City Board of Education; MARY BUSHNELL, in her

No. 95-2525

official capacity as member of the Chapel Hill-Carrboro City Board of Education; JUDITH ORTIZ, in her official capacity as member of the Chapel Hill-Carrboro City Board of Education; RUTH ROYSTER, in her official capacity as member of the Chapel Hill-Carrboro City Board of Education; NEIL G. PEDERSEN, in his official capacity as Superintendent of Chapel Hill-Carrboro City Schools,

Defendants-Appellees.

KATE BREEN; AMY CLOUD; AMY ROUSE; AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION,

Amici Curiae.

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham.
Frank W. Bullock, Jr., Chief District Judge.
(CA-94-196-1)

Argued: March 5, 1996

Decided: July 11, 1996

Before ERVIN and NIEMEYER, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Ervin wrote the opinion, in which Judge Niemeyer and Senior Judge Butzner joined.

COUNSEL

ARGUED: Scott Glenn Bullock, INSTITUTE FOR JUSTICE, Washington, D.C., for Appellants. John Gregory McCormick, JOHN G. MCCORMICK, P.A., Chapel Hill, North Carolina, for Appellees. **ON BRIEF:** William H. Mellor, III, Clint D. Bolick, INSTITUTE FOR JUSTICE, Washington, D.C., for Appellants. Eric W. Hinson, JOHN G. MCCORMICK, P.A., Chapel Hill, North Carolina; Rex E. Lee, Joseph R. Guerra, Dennis D. Hirsch, Michael J. Raphael, SIDLEY & AUSTIN, Washington, D.C.; for Appellees. Richard Schwartz, SCHWARTZ & ASSOCIATES, Raleigh, North Carolina, for Amici Curiae Breen, Cloud, Rouse, and American Alliance, Ann L. Majestic, Ruth T. Dowling, Kathleen C. Boyd, THARRINGTON SMITH, Raleigh, North Carolina, for Amicus Curiae School Boards Association.

OPINION

ERVIN, Circuit Judge.

The Chapel Hill-Carrboro City Schools require as a condition of graduation that high school students perform fifty hours of community service. Two students and their parents sued the Chapel Hill-Carrboro City Board of Education, the individual board members, and the system superintendent (collectively "the district"). The plaintiffs charged that the community-service requirement violates the students' constitutional rights to freedom from involuntary servitude, personal liberty, and privacy; and the parents' constitutional right to direct the upbringing and education of their children. They sought a declaratory judgment and an injunction prohibiting implementation

of the requirement. The district court entered summary judgment in favor of the district, finding that the requirement does not violate the plaintiffs' constitutional rights. We agree, and therefore affirm.

I.

Subject matter jurisdiction in the district court was proper under 28 U.S.C. §§ 2201, 2202, and 1331. We have appellate jurisdiction over the district court's summary judgment under 28 U.S.C. § 1291. We review the summary judgment *de novo*. *E.g.*, *Goodman v. RTC*, 7 F.3d 1123, 1126 (4th Cir. 1993).

II.

The facts are not in dispute, so we adopt the statement from the district court's opinion:

> Defendant Chapel Hill-Carrboro City Board of Education is a governmental agency and body corporate organized under the education code of North Carolina, N.C. Gen. Stat. § 115C-40. Its members are charged with administering the Chapel Hill-Carrboro City School System. The system's high school, Chapel Hill High School, is located in Chapel Hill, North Carolina, and had a 1994-95 enrollment of 2,061 students in grades nine through twelve. Defendants Ken Touw, Sue Baker, Lavonda Burnette, Mary Bushnell, Judith Ortiz, Mark Royster, and Ruth Royster were, at the time this action was filed, individuals holding elective office as members of the Chapel Hill-Carrboro City Board of Education and each is sued in his or her official capacity.

At the time this action was filed, Defendant Neil G. Pedersen was superintendent of the Chapel Hill-Carrboro City Schools and an agent and employee of Defendant Board of Education. Defendant Pedersen is sued in his official capacity.

Beginning with the graduating class of 1997, students enrolled in the Chapel Hill-Carrboro School System are required to complete fifty (50) hours of community service during grades nine through twelve as a condition to receiving a diploma.[1] Failure to complete the Program makes a student ineligible for graduation and the Program does not contain an opt-out provision for students who object to performing community service. The community service required by the Program must be performed after school, on weekends or holidays, or over summer recesses. Students are required to perform a minimum of two different types of service. Clerical work is limited to no more than eight (8) hours, as are fundraising activities. The community service coordinator at Chapel Hill High School keeps on file a list of approved agencies and organizations for whom students may work to satisfy the requirements of the Program. The list of organizations for which students may work is extensive and includes many with significantly different purposes and philosophies.

[1]The hour requirements for students who transfer in to the Chapel Hill-Carrboro School System after the ninth grade are prorated.

Students may also receive credit for service performed for organizations which are not included on the list of approved organizations.

However, in order for a student to receive credit for service performed for an organization not included on the list, a student must receive approval from the Service Learning Committee, a group of teachers, students, and members of community organizations charged with administering the Program. Ultimately, however, the principal of the high school is the final decision-maker concerning community service credit.

Services for which students receive monetary compensation or which are required as a form of restitution cannot be used to satisfy the requirements of the Program. Credit may not be received for service to a for-profit organization unless the service provides a benefit to the clients of such organization that they otherwise would not receive. Service provided to a group such as a church or student club, which primarily benefits the organization's members, will not be approved. Neither may activities that promote political parties or individual candidates be credited. Students must set their own work schedule and provide their own transportation to and from the location at which they perform community service. The organizations for which students perform their services are responsible for providing any training or necessary supervision. When students arrive to perform their service, students must sign in with the organization and a contact person with the organization must document the hours the student works. Students are required to turn verified time sheets in to the school. Each time a student performs service for an organization, he or she is thereafter required to reflect on any "memories or special feelings" gained from the particular service experience. After students complete

> the fifty (50) hours of required service, they must submit a one-to-two-page paper reflecting on their service experiences.

899 F.Supp. 1443, 1446-47 (1995) (citation to appendix omitted).

III.

The plaintiffs do not appeal the district court's finding that the service requirement does not intrude on the students' right to privacy. We address individually the remaining constitutional issues.

A.

The parents argue that the service requirement "violates parents' right to direct and control the upbringing and education of their children secured by the Fourteenth Amendment to the United States Constitution." That right is fundamental, they contend, so any infringement of it is subject to strict judicial scrutiny. Unless the district can demonstrate a compelling interest in implementing the service requirement, they assert, and can show that the requirement is narrowly tailored to advance that interest in the manner least restrictive of the parents' right, the requirement cannot survive strict scrutiny.

The parents' argument is controlled by the substantive due process branch of Fourteenth Amendment jurisprudence. Under that body of law, courts examine whether government intrusions into citizens' liberties are justified by adequate state interests. We apply a tiered

framework of analysis, subjecting infringements on liberties deemed constitutionally "fundamental" to a heightened or "strict" level of judicial scrutiny, and examining encroachments on lesser rights under "the traditional standard of review, which requires only that the [challenged state action] be shown to bear some rational relationship to legitimate state purposes." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-40 (1973).

The Supreme Court long has recognized the existence of parents' right to direct their children's education. It first did so nearly seventy-five years ago in *Meyer v. Nebraska*, in which a teacher appealed his conviction for teaching German in violation of state law. 262 U.S. 390, 396-97 (1923). "[W]ithin the liberty of the [Fourteenth] Amendment," the Court held, is a right of parents to seek German instruction for their children. *Id.* at 400. Two years after *Meyer*, in *Pierce v. Society of Sisters*, the Court examined an Oregon statute requiring all children to attend public schools. 268 U.S. 510, 530 (1925). Citing *Meyer*, it invalidated the statute as "interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. After two more years, in *Farrington v. Tokushige*, the Court overturned a Hawaii restriction on foreign language schools, holding that "[t]he Japanese parent has the right to direct the education of his own child without unreasonable restrictions." 273 U.S. 284, 298 (1927).

Meyer, *Pierce*, and *Tokushige* all use the language of rational relationship review. *Meyer*, 262 U.S. at 403 ("We are constrained to conclude that the statute as applied is arbitrary, and without *reasonable relation* to any end within the competency of the state.") (emphasis added);

Pierce, 268 U.S. at 534-35 ("unreasonably interferes"); *Tokushige*, 273 U.S. at 298 ("without unreasonable restrictions"). But all three were decided before the Court developed the current tiered framework – when it used only the "traditional" standard of scrutiny, *see Rodriguez*, 411 U.S. at 40 – so they provide no dispositive guidance on which standard applies. Strict scrutiny of infringements on fundamental rights was first suggested in 1961. *See Poe v. Ullman*, 367 U.S. 497, 548 (Harlan, J., dissenting) (1961) ("This enactment [a restriction on contraception] involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to 'strict scrutiny.' " (citation omitted)). And it was not expressly embraced by a majority of the Court until 1971. *See Graham v. Richardson*, 403 U.S. 365, 375 (1971).

The Court came close to deciding which standard protects parental rights in education in *Wisconsin v. Yoder*, in which it overturned convictions of Amish parents for removing their children from school before age sixteen. 406 U.S. 205, 207, 234 (1972). Citing *Meyer* and *Pierce*, it reaffirmed that parental rights are among the liberties protected by the Constitution. *Id.* at 232-33. When those rights combine with First Amendment free exercise concerns, the Court held, they are fundamental: "[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the *religious* future and education of their children." *Id.* at 232 (emphasis added). Because religious concerns were central to the

Yoder petitioners' position, the Court did not decide specifically whether the parental rights standing alone, in nonreligious contexts, are "fundamental" in the constitutional sense, or whether heightened scrutiny applies. But its opinion included dicta that are directly on point:

> [W]e must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to *reasonable* state regulation of education if it is based on purely secular considerations.

Id. at 215 (emphasis added).

Soon after *Yoder*, in *Runyon v. McCrary*, the Court addressed racial segregation in private schools. 427 U.S. 160, 163 (1976). It held that the parental liberty recognized in *Meyer* and *Pierce* was not infringed upon by the prohibition of such segregation, because the law restricted admission policies rather than curriculum or choice of schools. *Id.* at 177. Thus it did not decide how closely to scrutinize restriction of that liberty. Nevertheless, like *Yoder*, the *Runyon* opinion included instructive dicta:

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by *reasonable* government regulation. See *Wisconsin v. Yoder, supra,* at 213; *Pierce v. Society of Sisters, supra,* at 534; *Meyer v. Nebraska,* 262 U.S., at 402.

Id. at 178 (emphasis added); *accord Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 n.4 (1993) (Souter, J., concurring in part and concurring in the judgment) ("Where parents make a 'free exercise claim,' . . . the *Pierce* reasonableness test is inapplicable and the State's action must be measured by a stricter test, the test developed under the Free Exercise Clause. . . . ").

From *Meyer* to *Runyon*, the Supreme Court has stated consistently that parents have a liberty interest, protected by the Fourteenth Amendment, in directing their children's schooling. Except when the parents' interest includes a religious element, however, the Court has declared with equal consistency that *reasonable* regulation by the state is permissible even if it conflicts with that interest. That is the language of rational basis scrutiny. The claimants in this case concede that their interest is not religious, so we must reject their position if the service requirement "bear[s] some rational relationship to legitimate state purposes." *Rodriguez*, 411 U.S. at 40 (1973). The parents also acknowledge "the basic legitimacy" of the district's interest in teaching students the value of service, and that the service requirement is rationally related to that interest. Thus, under rational-basis scrutiny, the requirement does not infringe unconstitutionally on their right to control their children's education.[1]

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[1] The Second Circuit addressed this issue earlier this year in *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996). Citing *Pierce*, *Meyer*, *Yoder*, and *Runyon*, among other cases, it agreed that parents' right to direct their children's education is subject only to rational-basis review, and that the educational purpose of a community service requirement easily satisfies that standard. *Id.* at 461-62.

B.

The students also advance a substantive due process argument, "that within the range of personal decisions protected by the Fourteenth Amendment must be the right to determine whether an individual wishes to provide charitable service to others." They acknowledge that there is no precedent for their argument, but claim that the right is rooted in "the long-established common law principle of refusing to transform what many would consider a moral duty (service to others) into a state-imposed obligation."

It is true that common law imposed no duty to serve others. But the absence of a common-law duty does not imply a constitutional prohibition against the imposition of such a duty. The Supreme Court has granted substantive due process protection only to rights that it deems particularly important. Those rights include liberties expressly protected by the Bill of Rights, *see Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992), and others that are not specified in the Constitution but involve "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id.* at 851 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)).

Freedom from compulsory charitable service is not among the rights the Court has recognized, and the Court has expressed forcefully that we should expand the sphere of those rights only with great caution:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable

> roots in the language or design of the Constitution. . . . There should be, therefore, great reluctance to expand the substantive reach of these Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986). Justice O'Connor noted in *Casey* that the Court has expanded substantive due process beyond the Bill of Rights only to rights that "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy. . . . " 505 U.S. at 851. The decision to serve one's community is important, but it is not so "intimate and personal" that it merits Fourteenth Amendment protection.[2]

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[2] The Second Circuit's *Immediato* decision addressed this issue, also:

> In light of the Supreme Court's recent admonition that we should be "reluctant to expand the concept of substantive due process," *Collins v. City of Harker Heights*, ___ U.S. ___, 112 S.Ct. 1061, 1068 (1992), we decline plaintiffs' invitation to be the first court to [hold that the decision whether to serve others is a fundamental right]. Daniel's choice as to how to spend his free time, and whether or not he will perform any volunteer services, is not the stuff to which strict scrutiny is devoted.

Immediato, 73 F.3d at 463.

C.

Finally, the students argue that requiring them to perform community service violates the Thirteenth Amendment prohibition of involuntary servitude. They argue that while the chief aim of the amendment was to abolish slavery, "involuntary servitude" is a broader concept including, outside of well-established exceptions, any " 'control by which the personal service of one man is disposed of or coerced for another's benefit.' " Brief of Appellants at 28 (quoting *Bailey v. Alabama*, 219 U.S. 219, 240-41 (1911)). The district court, following the Supreme Court's statement in *Lee v. Weisman* that the option not to participate in one's high school graduation is not a voluntary choice, determined that the required service is not voluntary. 899 F. Supp. 1443, 1448 (1995) (citing 505 U.S. 577, 594-95 (1992) (holding that First Amendment Establishment Clause prohibits school-sponsored prayer at public high school graduation ceremony)). It held, however, that the labor required by the service requirement is not sufficiently "akin to African slavery" to warrant prohibition under the Thirteenth Amendment. *Id.* at 1447-49 (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)). The students contend that the district court's opinion contradicts the plain meaning of the Thirteenth Amendment, because "involuntary servitude" is, simply, service that is not voluntary. To ignore the Amendment's plain meaning in favor of its "general spirit," they argue, is error. Brief of Appellants at 29 (quoting 899 F. Supp. at 1449).

We agree that the district court's reasoning was flawed, but we concur in its conclusion. The court's reliance on *Lee v. Weisman* was misplaced, for voluntariness under the Establishment Clause is not equivalent to voluntariness under the Thirteenth Amendment. The

reach of the Establishment Clause extends beyond forced exposure to particular religious ideas to mere endorsement of them, *County of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989), or "excessive entanglement" with them, *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Thus the degree of involuntariness needed to invoke the Establishment Clause is exceedingly low, and includes the "subtle and indirect" pressure generated by school-sponsored, nonsectarian prayer. *See Weisman*, 505 U.S at 593. The *Weisman* Court itself acknowledged that its use of the word "voluntary" was distinguishable from the term's general definition: "[T]he fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise." *Id.* at 596.

In the Thirteenth Amendment context, "subtle or indirect" pressure to work does not render that work involuntary. In *United States v. Kozminski*, in applying 18 U.S.C. § 241, the Supreme Court reviewed its previous Thirteenth Amendment decisions: "[O]ur precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion." 487 U.S. 931, 944 (1988). Section 241 criminalizes conspiracy against citizens' rights, and applies only to "rights *established* by the Federal Constitution or laws and by decisions interpreting them," so the Court cautioned that it did not intend its survey to limit conclusively "the potential scope of the Thirteenth Amendment." 487 U.S. at 941, 944 (emphasis added). But the Court previously had limited the scope of involuntary servitude, in *Butler, supra*, to "those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results." 240 U.S. at 332.

Graduation from a public high school is an important opportunity, but the threat of not graduating does not rise to the level of "physical or legal coercion." *Kozminski*, 487 U.S. at 944. More importantly, the community service requirement is in no way comparable to the horrible injustice of human slavery. *See Butler*, 240 U.S. at 332. Thus it does not violate the Thirteenth Amendment prohibition of involuntary servitude.[3]

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[3] Two other circuits recently have addressed this question. Citing *Butler* and *Kozminski*, the Third Circuit held that a mandatory service requirement did not violate the Thirteenth Amendment because it was not "akin to African slavery":

> There is no basis in fact or logic which would support analogizing a mandatory community service program in a public high school to slavery. The record amply supports the defendants' claim that the community service program is primarily designed for the students' own benefit and education, notwithstanding some incidental benefit to the recipients of the services. An educational requirement does not become involuntary servitude merely because one of the stated objectives of the Program is that the students will work "without receiving pay."

Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 998, 1000 (3d Cir.), *cert. denied*, 114 S. Ct. 85 (1993). The Second Circuit agreed:

> Because we conclude that the mandatory community service program is not, on the whole, "compulsory labor" which, "in practical operation" produces "undesirable results" analogous to slavery, *Kozminski*, 487 U.S. at 492, we hold that the District's mandatory community service program does not constitute impermissible involuntary servitude.

Immediato, 73 F.3d at 460.

IV.

The district's community service requirement does not intrude on the students' freedom from involuntary servitude, their right to privacy, or their parents' right to direct their upbringing and education. Thus we affirm the district court's summary judgment.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 28, 1996

No. 95-2525
CA-94-196-1

ARIC HERNDON, a minor by Christiana and John Herndon, as Guardians; CHRISTIANA HERNDON, as Guardian of Aric Herndon, a minor, and in her own right; JOHN HERNDON, as Guardian of Aric Herndon, a minor, and in his own right; JOHN REINHARD, III, a minor by John and Ellen Reinhard, as Guardians; JOHN REINHARD, as Guardian of John Reinhard III, a minor, and in his own right; ELLEN REINHARD, as Guardian of John Reinhard III, a minor and in her own right

Plaintiffs-Appellants

v.

CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION; KEN TOUW, in his official capacity as member of the Chapel Hill-Carrboro City Board of Education; SUE BAKER, in her official capacity as member of the Chapel Hill-Carrboro City Board of Education; LAVONDA BURNETTE, in her official capacity as member of the Chapel Hill-Carrboro City Board of Education; MARY BUSHNELL, in her official capacity as member of the Chapel Hill-Carrboro City Board of Education; JUDITH ORTIZ, in her official capacity as member of the Chapel Hill-Carrboro City Board of Education; RUTH ROYSTER, in her official capacity as member of the Chapel Hill-Carrboro City Board of Education; NEIL G. PEDERSEN, in his official capacity as Superintendent of Chapel Hill-Carrboro City Schools

Defendants-Appellees

KATE BREEN; AMY CLOUD; AMY ROUSE; AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants filed a petition for rehearing with suggestion for rehearing in banc.

Judges Ervin, Niemeyer and Butzner and [sic] voted to deny the petition for rehearing.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Russell, Widener and Hall voted to rehear the case in banc, and Chief Judge Wilkinson and Judges Murnaghan, Ervin, Wilkins, Niemeyer, Hamilton, Luttig Williams, Michael, and Motz voted against rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Ervin for the Court.

For the Court,

/s/ Bert M. Montague
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

ARIC HERNDON, a minor, by CHRISTIANA and JOHN HERNDON, as Guardians, and in their own right, and JOHN REINHARD, III, a minor, by JOHN and ELLEN REINHARD, as Guardians, and in in [sic] their own right,

Plaintiffs,

v.

CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION; KEN TOUW, SUE BAKER, LAVONDA BURNETTE, MARY BUSHNELL, JUDITH ORTIZ, MARK ROYSTER, RUTH ROYSTER, in their official capacities as members of the Chapel Hill-Carrboro City Board of Education; and NEIL G. PEDERSEN, in his official capacity as Superintendent of Chapel Hill-Carrboro City Schools,

Defendants.

Civil No. 1:94CV00196

(Filed Jul. 19, 1995)

ORDER and JUDGMENT

BULLOCK, District Judge

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that Plaintiffs' motion for summary judgment be, and the same hereby is, **DENIED.**

IT IS FURTHER ORDERED AND ADJUDGED that Defendants' motion for summary judgment be, and the same hereby is, **GRANTED** and this action is **DISMISSED** with prejudice.

/s/ Frank Bullock, Jr.
United States
District Judge

July 19, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

ARIC HERNDON, a minor, by CHRISTIANA and JOHN HERNDON, as Guardians, and in their own right, and JOHN REINHARD, III, a minor, by JOHN and ELLEN REINHARD, as Guardians, and in in [sic] their own right, Plaintiffs, v. CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION; KEN TOUW, SUE BAKER, LAVONDA BURNETTE, MARY BUSHNELL, JUDITH ORTIZ, MARK ROYSTER,	Civil No. 1:94CV00196 (Filed Jul. 19, 1995)

RUTH ROYSTER, in their official capacities as members of the Chapel Hill-Carrboro City Board of Education; and NEIL G. PEDERSEN, in his official capacity as Superintendent of Chapel Hill-Carrboro City Schools,

Defendants.

MEMORANDUM OPINION

BULLOCK, District Judge

This case, involving a program in the Chapel Hill-Carrboro School System requiring students to perform fifty (50) hours of unpaid community service outside of the normal school hours during their high school years as a condition of their graduation, comes before the court on cross-motions for summary judgment filed by all parties. Plaintiffs seek a declaration that the Program violates the United States Constitution and an injunction against its implementation. Plaintiffs contend that the Program is unconstitutional because: (1) it constitutes involuntary servitude prohibited by the Thirteenth Amendment; (2) it violates plaintiff parents' right to direct the upbringing and education of their children in violation of the Ninth and Fourteenth Amendments; (3) it deprives plaintiff students of their personal liberty in violation of the Fourteenth Amendment; and (4) it violates the privacy rights of plaintiff students in violation of the Ninth and Fourteenth Amendments. Because the court finds that the Program is not unconstitutional on any of the grounds raised by Plaintiffs' summary judgment will be granted for Defendants on all of Plaintiffs' claims.

I.

The parties have stipulated to most of the facts crucial to the disposition of this case, and the material facts are undisputed. Plaintiffs are students, and the parents and guardians of students, in the Chapel Hill-Carrboro School System. Suit is brought by the parents and guardians in their own behalf and in behalf of the students.

Defendant Chapel Hill-Carrboro City Board of Education is a governmental agency and body corporate organized under the education code of North Carolina, N.C. Gen. Stat. § 115C-40. Its members are charged with administering the Chapel Hill-Carrboro City School System. The system's high school, Chapel Hill High School, is located in Chapel Hill, North Carolina, and had a 1994-95 enrollment of 2,061 students in grades nine through twelve. Defendants Ken Touw, Sue Baker, Lavonda Burnette, Mary Bushnell, Judith Ortiz, Mark Royster, and Ruth Royster were, at the time this action was filed, individuals holding elective office as members of the Chapel Hill-Carrboro City Board of Education and each is sued in his or her official capacity.

At the time this action was filed, Defendant Neil G. Pedersen was superintendent of the Chapel Hill-Carrboro City Schools and an agent and employee of Defendant Board of Education. Defendant Pedersen is sued in his official capacity.

Beginning with the graduating class of 1997, students enrolled in the Chapel Hill-Carrboro School System are required to complete fifty (50) hours of community service during grades nine through twelve as a condition to

receiving a diploma.[1] Failure to complete the Program makes a student ineligible for graduation and the Program does not contain an opt-out provision for students who object to performing community service. The community service required by the Program must be performed after school, on weekends or holidays, or over summer recesses. Students are required to perform a minimum of two different types of service. Clerical work is limited to no more than eight (8) hours, as are fundraising activities. The community service coordinator at Chapel Hill High School keeps on file a list of approved agencies and organizations for whom students may work to satisfy the requirements of the Program. The list of organizations for which students may work is extensive and includes many with significantly different purposes and philosophies.[2]

Students may also receive credit for service performed for organizations which are not included on the list of approved organizations. However, in order for a student to receive credit for service performed for an organization not included on the list, a student must receive approval from the Service Learning Committee, a group of teachers, students, and members of community organizations charged with administering the Program. Ultimately, however, the principal of the high school is the final decision-maker concerning community service credit.

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[1] The hour requirements for students who transfer in to the Chapel Hill-Carrboro School System after the ninth grade are prorated.

[2] See Appendix.

Services for which students receive monetary compensation or which are required as a form of restitution cannot be used to satisfy the requirements of the Program. Credit may not be received for service to a for-profit organization unless the service provides a benefit to the clients of such organization that they otherwise would not receive. Service provided to a group such as a church or student club, which primarily benefits the organization's members, will not be approved. Neither may activities that promote political parties or individual candidates be credited. Students must set their own work schedule and provide their own transportation to and from the location at which they perform community service. The organizations for which students perform their services are responsible for providing any training or necessary supervision. When students arrive to perform their service, students must sign in with the organization and a contact person with the organization must document the hours the student works. Students are required to turn verified time sheets in to the school. Each time a student performs service for an organization, he or she is thereafter required to reflect on any "memories or special feelings" gained from the particular service experience. After students complete the fifty (50) hours of required service, they must submit a one-to-two-page paper reflecting on their service experiences.

II.

Plaintiffs allege that the Program imposes involuntary servitude upon plaintiff students in violation of the Thirteenth Amendment to the United States Constitution. Plaintiffs base this allegation on the fact that Defendants

have conditioned the receipt of a public high school diploma on the students having to work for others against their will without compensation.

The Thirteenth Amendment declares that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Although Section 2 authorizes Congress to enact legislation to enforce the Amendment, the Amendment has been held to be "self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). The Thirteenth Amendment was adopted to eliminate slavery and "those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results." *Butler v. Perry*, 240 U.S. 328, 332 (1916). The purpose of the Thirteenth Amendment was "not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States." *Pollock v. Williams*, 322 U.S. 4, 17 (1944).

The Supreme Court early recognized that the government may legitimately require its citizens to perform certain services for the benefit of the common good without violating the Thirteenth Amendment because of historical exclusions from the Thirteenth Amendment which allow their imposition. *See Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) (upholding the government's power to compel military service); *Butler*, 240 U.S. at 332-33 (upholding a state law that required men to work on the roads and bridges of the state, stating that the Thirteenth

Amendment "was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc."); *Robertson v. Baldwin*, 165 U.S. 275, 282-88 (1897) (upholding a state statute authorizing the punishment and return of deserting seamen in the merchant service).

Lower federal courts have also recognized that a state may require its citizens to provide certain types of public service because of a civic duty owed to the state by its citizens or because of the public benefit conferred by the service. *See, e.g., Brogan v. San Mateo County*, 901 F.2d 762, 764 (9th Cir. 1990) (upholding a county's workfare program whereby the receipt of public assistance was conditioned on the recipient's participation in a county work program); *Delgado v. Milwaukee County*, 611 F. Supp. 278, 280 (E.D. Wis. 1985) (holding a similar work relief program valid), *aff'd*, 789 F.2d 919 (7th Cir. 1986); *United States v. 30.64 Acres of Land*, 795 F.2d 796, 801 (9th Cir. 1986) (upholding a requirement that attorneys perform *pro bono* work) (citing *White v. United States Pipe & Foundry Co.*, 646 F.2d 203, 205 n.3 (5th Cir. 1981)); *Bobilin v. Board of Educ.*, 403 F. Supp. 1095, 1104 (D. Haw. 1975) (upholding regulations that required public school children to work in the school cafeteria because the imposition on the students was "more than outweighed by the conceded public benefit involved").

While this case does not fit neatly within the ambit of any previously recognized historical exclusions from the Thirteenth Amendment, the court is aware of "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v.*

Norwick, 441 U.S. 68, 76 (1979). "[T]here is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982). The court is mindful of the purposes and intended effects of the Chapel Hill-Carrboro Program and the Supreme Court's recognition that "local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values." *Id.* (internal quotations omitted).

In *Immediato v. Rye Neck Sch. Dist.*, 873 F. Supp. 846 (S.D.N.Y. 1995), a case directly on point, the district court, in considering a New York public school program requiring forty (40) hours of community service challenged under the Thirteenth Amendment, held that such a program did not involve the type of physical force or legal sanction present in Supreme Court decisions finding involuntary servitude, and that the board of education reasonably could conclude that the benefit to the student outweighed the incidental burden of the labor requirement.

In another case on point, the Third Circuit held that a Pennsylvania public school program which required sixty (60) hours of community service during a student's four (4) years of high school was not violative of the Thirteenth Amendment. *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989 (3d Cir.), *cert. denied*, 114 S. Ct. 85 (1993). That court, "taking a contextual approach to involuntary servitude by confining the Thirteenth Amendment to those situations that are truly 'akin to African slavery,' " found that there was "no basis in fact or logic which

would support analogizing a mandatory community service program in a public high school to slavery." *Id.* at 1000. In so holding, the court noted that a critical factor in every case finding involuntary servitude has been that the victim's only choice was between performing the labor on one hand and physical and/or legal sanctions on the other, and that when there are alternatives to performing the labor, even though such choices may not be appealing, the required labor does not constitute involuntary servitude. *Id.*

Both the *Immediato* and *Steirer* courts are correct that the Supreme Court has not extended the scope of Thirteenth Amendment involuntary servitude beyond servitude coerced by legal or physical means. *See United States v. Kozminski*, 487 U.S. 931, 942-44 (1988). Nor have the Fourth Circuit and the majority of lower federal courts held that sanctions other than legal or physical coercion implicate the Thirteenth Amendment. *See, e.g., United States v. Harris*, 701 F.2d 1095, 1100 (4th Cir.), *cert. denied*, 463 U.S. 1214 (1983) (upholding convictions under 18 U.S.C. § 1584 based on the defendants' use of physical coercion, and stating that "it is clear that a mere reminder by the employer that the consequences of leaving will be exceedingly bad (*e.g.*, deportation) is not enough" to support a conviction under the statute (citing *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964) (holding that a conviction under 18 U.S.C. § 1584 could not be supported "by a threat to have the employee sent back to the country of his origin, at least absent circumstances which would make such deportation equivalent to imprisonment or worse"))); *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981) (upholding convictions under 18 U.S.C.

§ 1583 (a companion statute to § 1584) for kidnapping another person with the intent to hold them as a slave because the defendants' threats "of violence or confinement, backed sufficiently by deeds as in this case, suffice[d] to subjugate human beings to the will of another in violation of the thirteenth amendment and § 1583").

In the present case, however, this court will not rely on the fact that a student, in lieu of participating in the Program, is not prevented from obtaining a diploma at a private school, transferring to another public school system, seeking a GED, or dropping out of school. As Justice Kennedy wrote in *Lee v. Weisman*, the graduation prayer case, to say that a high school student has the choice not to participate in his or her high school graduation is "formalistic in the extreme." 112 S. Ct. 2649, 2659 (1992). Nevertheless, the community service required in this case does not come within the general spirit of the Thirteenth Amendment's prohibition of slavery and involuntary servitude and is simply not the "servitude" the Thirteenth Amendment was enacted to guard against.

The Program, requiring only fifty (50) hours of service over a period of four (4) years to any of a multitude of organizations, cannot be said to be a form of compulsory labor "akin to African slavery." The students are allowed to choose the organizations for which they will work from a wide variety of organizations and they are free to schedule the hours which they wish to work. There is nothing in the record to indicate that the conditions under which the students work are unreasonable or oppressive. Plaintiffs have a great deal of free time otherwise to do as they wish, including engaging in other

forms of community service outside of the fifty (50) hours required by the Program.

The requirements of the Program are not "in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate." *Memphis v. Greene*, 451 U.S. 100, 128 (1981). To regard the Program, possessing none of the undesirable incidents of slavery, as violative of the Thirteenth Amendment would "trivialize the great purpose of that charter of freedom." *Id.*

III.

Plaintiffs' complaint alleges that the Program is violative of plaintiff parents' Ninth and Fourteenth Amendment right to direct and control the upbringing and education of their children. While plaintiff parents state that they support private, charitable efforts and voluntary service to the community, they allege that they fundamentally believe that the decision to help others must always come from one's own conscience and that it cannot be imposed by the government. Plaintiff parents state that they attempt to impart these values to their children as well. Plaintiffs do not challenge the legitimacy of the interests offered by Defendants to justify the Program. Neither do Plaintiffs contest the ability of Defendants to impart these values to plaintiff students "in some manner." However, Plaintiffs object to the *means* by which Defendants attempt to impart these interests to plaintiff students through the Program. Plaintiffs allege that the Program infringes upon a fundamental right, that of plaintiff parents to direct the upbringing and education

of their children. Plaintiffs argue that because this right is infringed the Program is invalid.

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive an individual of life, liberty, or property without due process of law." U.S. Const. amend. XIV. The Due Process Clause "has been understood to contain a substantive component . . . , one 'barring certain government actions regardless of the fairness of the procedures used to implement them.' " *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The rights guaranteed by the Due Process Clause serve as "bulwarks . . . against arbitrary legislation." *Hurtado v. California*, 110 U.S. 516, 532 (1884), *quoted in Casey*, 112 S. Ct. at 2804.

A crucial determination in examining the constitutionality of a challenged governmental statute or regulation under the substantive component of the Due Process Clause, and one on which the parties disagree, is the appropriate standard of review. The Supreme Court has set forth two standards of review for use in cases involving legislation challenged under the substantive component of the Due Process Clause: "strict scrutiny" and "rational basis."

A challenged governmental statute or regulation that burdens a "fundamental" interest is examined under the strict scrutiny test. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Under the strict scrutiny test, the challenged legislation is held unconstitutional unless the government can show that the legislation is "justified . . . by a 'compelling state interest' " and is "narrowly drawn to express

only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citations omitted).

A challenged governmental statute or regulation that "has no substantial impact on any fundamental interest and does not 'affect with particularity any protected class' " is examined under the rational basis test. *Lyng v. International Union, UAW*, 485 U.S. 360, 370 (1988) (citations omitted). Under the rational basis test, challenged legislation that " 'is rationally related to a legitimate governmental interest' " must be upheld. *Id.* (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973)). The rational basis "standard of review is typically quite deferential." *Id.* Legislation examined under the rational basis test "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981). The challenger of such legislation has a "heavy burden." *Id.* at 332.

The Supreme Court recognized long ago that the liberty guaranteed by the Fourteenth Amendment includes the right of parents to direct the upbringing and education of their children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (recognizing the right to "establish a home and bring up children" and the "power of parents to control the education of their own"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing the "liberty of parents and guardians to direct the upbringing and education of children under their control"). More recently, the Supreme Court has recognized that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in

the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).[3]

The importance of the right of parents to direct the education and upbringing of their children is well established. However, the Supreme Court's treatment of this right makes it clear that the right of individual parents to exert pre-emptive control over the curriculum of public schools is not a "fundamental" one subject to "strict scrutiny."

In early cases in which the liberty of parents and guardians to direct the upbringing and education of their children was first being defined, the Court held that "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Meyer*, 262 U.S. at 399-400. In *Meyer*, a state law forbidding the teaching, in any public or private school, of any modern foreign language before the eighth grade was contested as interfering with foreign language teachers' right to teach, with the right of pupils to acquire knowledge, and with the right of parents to control the education of their children. *Id.* at 401. The Court struck down the statute as

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[3] The Supreme Court has recognized that "[t]he *Meyer-Pierce-Yoder* 'parental' right and the privacy right . . . may be no more than verbal variations of a single constitutional right." *Runyon v. McCrary*, 427 U.S. 160, 178 n.15 (1976) (citing *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (citing *Pierce*, 268 U.S. at 535, and *Meyer*, 262 U.S. 390)).

applied as "arbitrary and without reasonable relation to any end within the competency of the State." *Id.* at 403.

Two years later the Court in Pierce entertained a challenge to a state law requiring children between ages eight and sixteen to attend public school on the grounds that it interfered with the right of parents to direct the upbringing and education of their children. *Pierce,* 268 U.S. at 532. Invalidating the law, the Court held that

> [u]nder the doctrine of *Meyer v. Nebraska,* 262 U.S. 390, we think it entirely plain that the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 534-35.

More recently, the Court clarified its holding in *Pierce* and reinforced the general rule that the rights of parents to direct the education and upbringing of their children "may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." *Yoder,* 406 U.S. at 215. In *Yoder,* a state

law requiring all children under the age of sixteen to attend public or private school was challenged by members of the Old Order Amish Religion. These members believed that their children's attendance at high school was contrary to their religion and way of life and believed that by sending their children to high school they would risk censure of the church and endanger their salvation and that of their children. *Id.* at 209. Because the law implicated the Amish's rights to the free exercise of their religion as well as their parental rights, the Court applied a heightened standard of review to invalidate the requirement as applied to the Amish. *Id.* at 233, 234-36. The Court applied a heightened standard not because it found the rights of the parents in that case to be fundamental in and of themselves, but because the assertion of the rights of parents was *combined with a free exercise claim. Id.* at 233. The Court said that "when the interests of parenthood are combined with a free exercise claim . . . , more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Id.* at 233. The Court further stated that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." *Id.* at 215. In the present case, Plaintiffs do not object to the Program for religious reasons.[4] Rather, in regard to their claim for infringement upon their parental

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[4] See footnote 7, *infra*.

rights, plaintiff parents philosophically disagree with certain secular values sought to be taught to plaintiff students by the Program.

Finally, in a case holding that the prohibition of racial discrimination in admissions to private schools does not violate the right of parents to direct the upbringing and education of their children, the Supreme Court did not treat the right of the parents as a "fundamental right" which would require the application of strict scrutiny to any state infringement upon it. *See Runyon v. McCrary*, 427 U.S. 160, 178-79 (1976) (stating that parents "have no constitutional right to provide their children with private school education unfettered by reasonable government regulation" (citing *Yoder*, 406 U.S. at 213; *Pierce*, 268 U.S. at 534; *Meyer*, 262 U.S. at 402)).

Because Plaintiffs' objection to the Program arises out of purely secular concerns, the right asserted by plaintiff parents in this case is not a "fundamental" right. This conclusion is in accord with several other lower federal courts which have held that other types of state regulation have not infringed upon any fundamental right of parents to supervise the upbringing and education of their children. *See Murphy v. Arkansas*, 852 F.2d 1039, 1043 (8th Cir. 1988); *Null v. Board of Educ.*, 815 F. Supp. 937, 939 (S.D.W. Va. 1993); *see also Cornwell v. State Bd. of Educ.*, 428 F.2d 471, 472 (4th Cir. 1970), *aff'd* 314 F. Supp. 340 (D. Md. 1969) (holding the claim that plaintiff parents had an exclusive constitutional right to teach their children about sexual matters in their own homes was so insubstantial as not to confer jurisdiction upon a three-judge court under old 28 U.S.C. § 2281), *cert. denied*, 400 U.S. 942 (1970).

Therefore, the constitutionality of the Chapel Hill-Carrboro Board of Education Program will be determined under the rational basis test.[5] The rational relation standard is especially appropriate in cases examining specific

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[5] In its cases dealing with parental rights, the Supreme Court has indicated that legislation which bears some "reasonable relation" to a legitimate state interest should be upheld. The Supreme Court's use of the words "reasonable relation" does not preclude the application of the "rational basis" test in this case. The rational basis test generally requires that challenged legislation be "rationally related to a legitimate governmental interest." *Lyng*, 485 U.S. at 370 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973)). While the Supreme Court has spoken about a "reasonable relation" to a legitimate state interest in cases dealing with parental rights, the Court has used the words "reasonable relation" and "rational relation" interchangeably in other cases to refer to the rational basis test used in substantive due process and equal protection analysis. *See, e.g., Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981) ("In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?"); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 85 (1988) (holding a Mississippi law requiring certain unsuccessful appellants to pay an assessment of 15% of the judgment awarded against them to "pass muster under the rational-basis test" because "the means that the State has chosen are 'reasonably tailored to achieve [the State's legitimate] ends' " (quoting *Lindsey v. Normet*, 405 U.S. 56, 78 (1972))); *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (upholding under the rational basis test a Texas act requiring a majority of the state optometry board to be members of a certain professional organization of optometrists because the law was "related reasonably to the State's legitimate purpose of securing a Board that will administer the Act faithfully").

school-required educational programs because "courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *Yoder*, 406 U.S. at 235. Moreover, as the Supreme Court has stated, "[t]here is no doubt as to the power of a State . . . to impose reasonable regulations for the control and duration of basic education." *Id.* at 213.

In order for challenged legislation to pass muster under the rational-basis test, there must be some legitimate state interest to which the legislation is rationally related. Defendants contend that the State has a legitimate interest in educating students in its public high schools and in transmitting community values and instilling skills and habits of good citizenship to these students. Plaintiffs do not contest that these interests are indeed legitimate and within the competency of the State to effect. *See Pico*, 457 U.S. at 864 ("public schools are vitally important in the preparation of individuals for participation as citizens, and as vehicles for inculcating fundamental values necessary to the maintenance of a democratic political system. . . . [L]ocal school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values, and . . . there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political" (internal quotations and citations omitted)); *Yoder*, 406 U.S. at 221; *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *Pierce*, 268 U.S. at 534. As set forth below, the court finds that the requirements of the Program are rationally related to these legitimate state interests.

Defendants state that a community service program like the one sought to be implemented teaches participating students a variety of social, intellectual, and occupational skills, and instills in students awareness of civic responsibilities. Defendants contend that a community service program "allows students to develop a wider range of personal, intellectual, academic and social skills – such as teamwork, problem solving, negotiation, communication, planning, and evaluation – that will help them become effective employees, colleagues, citizens, and leaders." Defendants state that participants in school community service programs have reported "a positive effect on their concern for fellow human beings, self-motivation to learn, participate and achieve, sense of usefulness in relation to the community, sense of responsibility to their group, responsibility for their own life, awareness of community problems, communication skills, and sense of confidence, competence, and self-awareness."

The Chapel Hill-Carrboro Board of Education could reasonably conclude that the Program is rationally related to the legitimate state interest of educating students enrolled in its public schools and in preparing them for participation in society as citizens. The implementation of the Program is not arbitrary, and the Program's requirements are not unreasonable or overly onerous. Plaintiffs have not met their "heavy burden" of clearly showing that the Program is arbitrary and irrational. *See Hodel*, 452 U.S. at 331-32. Therefore, the Program does not violate the plaintiff parents' substantive due process rights.

Plaintiffs' complaint also alleges that the Defendants' Program also violates the *student* Plaintiffs' liberty interests in violation of *their* due process rights under the Fourteenth Amendment. However, there is no basis to find that the students' due process rights should be examined any differently than those of their parents, and this claim must fail as well.

IV.

Plaintiffs allege that Defendants' Program violates the privacy guarantees of the United States Constitution by requiring students to reveal to the school and fellow students where the students perform charitable service and their reaction to such service. As discussed below, Plaintiffs' argument in this regard must be rejected.

"The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (footnotes omitted); *see Hodge v. Jones*, 31 F.3d 157, 163-67 (4th Cir.) (records concerning suspected child abuse investigations kept after parents cleared of charges not protected), *cert. denied*, 115 S. Ct. 581 (1994); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (questions regarding homosexual sex, family information and arrests not protected; financial information protected); *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984) (prisoner's privacy

interest in family history outweighed by compelling public interest), *cert. denied*, 474 U.S. 982 (1985); *see also Vernonia Sch. Dist. 47J v. Acton*, ___ U.S. ___, 1995 WL 373274 (June 23, 1995) (random urinalysis requirement for student athletes held valid under Fourth and Fourteenth Amendments). Plaintiffs allege that both of these interests are violated by Defendants' requirement that students disclose their service activities.

"Personal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy." *Walls*, 895 F.2d at 192. Therefore, as the first step in determining whether the information sought by Defendants' Program is entitled to privacy protection, the court must examine whether the information is within the students' "reasonable expectations of confidentiality." *Id.* "The more intimate or personal the information, the more justified is the expectation that [the information] will not be subject to public scrutiny." *Id.* (citing *Fraternal Order of Police, Lodge 5 v. City of Philadelphia*, 821 F.2d 105, 112-13 (3d Cir. 1987)).

In *Walls*, the Fourth Circuit examined a background questionnaire given to employees of a city's alternative sentencing program. 895 F.2d at 189-95. There, an employee terminated because she refused to complete the questionnaire brought suit against the city arguing that certain questions violated her constitutional right to privacy. *Id.* at 191-95. The court held that, under *Bowers v. Hardwick*, 478 U.S. 186 (1986), a question regarding homosexual sex did not ask for information the plaintiff had a right to keep private. The court also held that questions regarding information that is freely available in public

records do not implicate the right of privacy because there can be no reasonable expectation of privacy in such information. The court held, however, that financial information, such as outstanding debts, is protected by the right to privacy. *Walls*, 895 F.2d at 194 (citing *Fraternal Order of Police*, 812 F.2d at 115; *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir.), *cert. denied*, 464 U.S. 1017 (1983)).

Plaintiffs argue that a student's particular choice of organizations to assist reveals the student's "concept of good" and reflects the underlying moral and political value-judgment of that student. Plaintiffs assert that some students will be compelled by their conscience to provide service to controversial or unpopular organizations, political causes,[6] or religious organizations. Plaintiffs contend that a student working for, or seeking approval for work done for, such organizations must reveal to the school and fellow students the social, political, or religious beliefs of the student, and therefore reveal information that is protected by the right of privacy just as financial information was protected in *Walls, supra*.

The information Plaintiffs seek to include within the right of privacy comes within none of the areas recognized as within a "zone of privacy" by the Supreme Court, *see Paul v. Davis*, 424 U.S. 693, 712-13 (1976) (citations omitted), or any other court. Moreover, a student's choice of or reaction to a school assignment is not within

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[6] Plaintiffs allege that, although Defendants' Program does not allow students to work for political parties or candidates, many of the approved organizations have political agendas and goals.

a student's "reasonable expectation of confidentiality." As school assignments, students may be asked to complete research and write about their favorite president, an interesting country, a particular book, current events, or political figures. They may be asked to write poetry, give a speech about a chosen topic, or write an essay on the judicial system. All of these assignments may reveal something about the student besides the student's grasp of grammar. A student may very well feel compelled by his or her conscience to praise the best known president of a particular political party, applaud the actions of a country considered hostile to the United States, complete a negative review of a religious book, criticize a particular group receiving recent publicity, or praise or denounce current political figures. However, a student does not have a reasonable expectation that such a choice or reaction is confidential. The current American scholastic experience is one in which students learn not only from books, but from each other as well.

Like the assignments discussed above, a student's choice of service projects and his or her written reaction to chosen projects may reveal something about the student. However, no more is revealed in such selection and writing than in more traditional school assignments. A student's choice of projects and reaction to those projects does not reveal such intimate or personal information that would give rise to a reasonable expectation of privacy. *See Walls*, 895 F.2d at 192. Therefore, Plaintiffs' arguments based on an alleged violation of their right of privacy in avoiding disclosure of personal matters are unavailing.

Plaintiffs argue that the Program conflicts with a second type of interest protected by the right of privacy. The right of privacy has been held to protect "independence in making certain kinds of important decisions." *Whalen*, 429 U.S. at 599-600 (footnote omitted). "Important decisions" held protected by the right of privacy include decisions regarding, *e.g.*, abortion, *Roe v. Wade*, 410 U.S. 113 (1973), contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), inter-racial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967), and parents' ability to choose a private rather than a public school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *cited in Whalen*, 429 U.S. at 600 n.26. Plaintiffs assert that the Program's disclosure requirement will cause students to choose "safe" service projects in order to avoid possible embarrassment and controversy. Plaintiffs contend that such a situation infringes upon their independence in "making an important decision" – choosing service projects.

The right of privacy has been held to protect only significant, personal decisions. The situation Plaintiffs seek to include within the right of privacy does not fall within the sphere of such decisions. The selection of one of many possible service organizations to work with for program credit, even if that selection is influenced by a fear of possible reputational damage as a result of the Program's described disclosure requirements, is not a decision protected by the right of privacy.

Plaintiffs also argue that the Program "chills" students' exercise of constitutional rights by requiring students to disclose the name of their chosen service project. The Supreme Court "consistently has refused to allow government to chill the exercise of constitutional rights

by requiring disclosure of protected, but sometimes unpopular, activities." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 767 (1986) (citing *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Talley v. California*, 362 U.S. 60, 64-65 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-65 (1958)). In *American College of Obstetricians & Gynecologists*, the Court invalidated an abortion-reporting statute that "pose[d] an unacceptable danger of deterring the exercise of" the right to choose to have an abortion. 476 U.S. at 767-68. The Court reasoned that the statute's "reporting requirements raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy." *Id.* at 767. In the case at bar, students' exercise of constitutional rights are not "chilled" by the Program's disclosure requirements. Students are not required to report *all* of their service work. Nor are students prohibited from working for non-approved organizations without credit. Students are required to report only fifty hours of service work over a period of four years. Students are otherwise free to choose and work for controversial or unpopular service projects without seeking credit from, and disclosing their choice to, the school or other students.[7]

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[7] Although Plaintiffs have not alleged any of their claims as First Amendment claims, the Herndon family states that their objection to disclosing activities for which Aric Herndon seeks project credit is based on, among other things, their Christian faith. However, there are no allegations and no evidence in the record that the Herndon family considers their belief concerning charitable activities to be a "central religious belief

V.

The court's holding is a narrow one based on the specific facts of this case. As the Supreme Court has recognized, a child is not a "mere creature of the State." *Pierce*, 268 U.S. at 535. Parents are rightly concerned about encroachments by the State into areas traditionally considered reserved to them. Ordinarily, however, it is not up to the federal courts to determine who should teach, what to teach, and how it should be taught. The Chapel Hill-Carrboro City Board of Education is made up of duly-elected officials who have discretion in establishing a curriculum for Chapel Hill High School. Plaintiffs retain the right to seek change by supporting, along with their neighbors, school board candidates who would cancel or revise the community service program.

Summary judgment will be granted for Defendants on all of Plaintiffs' claims.

An order and judgment in accordance with this memorandum opinion shall be entered contemporaneously herewith.

/s/ Frank Bullock, Jr.
United States
District Judge

July 19, 1995

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or practice." *See Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). Therefore, based on the evidence before the court and the right-of-privacy analysis discussed *supra*, the information Defendants require of the plaintiff Herndon family is not information protected by the right of privacy.

APPENDIX

March 1994

VOLUNTEER OPPORTUNITIES CURRENTLY ON FILE

(Come by Room A212 for more information and new listings added weekly)

ANIMAL SERVICES

Animal Protection Society
Orange County Animal Control

ARTS/LITERATURE

Ackland Art Museum
The ArtsCenter
Chapel Hill Arts & Music in Progress
N.C. Writer's Network
Orange County 4-H

CHILDREN/YOUTH SERVICES

Carolina Friends School
Carrboro Elementary After-School Program
Chapel Hill/Carrboro Head Start
Child Care Networks
Day Care Services
Ephesus Elementary After-School Program
Estes Hills Elementary After-School Program
FPG Elementary After-School Program
Glenwood Elementary After-School Program
Hargraves Recreation Center
Orange County 4-H Program
Orange-Durham Coalition for Battered Women
Seawell Elementary After-School Program
Street Scene Teen Center
Volunteers for Youth

COMMUNITY DEVELOPMENT & PLANNING

Chapel Hill Bicentennial
Chapel Hill-Carrboro Chamber of Commerce
Chapel Hill Downtown Commission/Volunteer Center
Chapel Hill/Orange County Visitors Bureau
Visitor's Center-Orange County

CRISIS, COUNSELING & SUPPORT SERVICES

Dispute Settlement Center
Orange County Rape Crisis Center
Orange Durham Coalition for Battered Women
Triangle Hospice
The Women's Center

EDUCATION

Chapel Hill-Carrboro Head Start Program
Center for Peace Education
Ephesus Elementary Science Lab
N.C. Health Careers Access Program
Orange County 4-H Club
UNC International Center

ENVIRONMENTAL HEALTH

Love Your Mother
New Hope Improvement Assoc./Streamwatch
Orange Community Recycling Program
SEAC

HEALTH SERVICES

American Cancer Society
American Heart Association
Group B Strep Association
Lineberger Comprehensive Cancer Center
Orange Cardiovascular Foundation
Ronald McDonald House

Triangle Hospice
UNC Hospitals
VA Medical Center

MENTAL HEALTH

Orange County Special Olympics
Residential Services, Inc.

MISCELLANEOUS

Center for Peace Education
UNC International Center

OUTDOOR WORK/LANDSCAPING

Carrboro Civic Club
Duke Gardens
Ephesus Elementary School
Habitat for Humanity
Orange County 4-H

PUBLIC/SOCIAL SERVICES

Carrboro Police Department
Chapel Hill Department of Housing
Chapel Hill Public Library
Habitat for Humanity
Interfaith Council for Social Services
Orange County Public Library
PTA Thrift Shop
UNC Public TV

RECREATIONAL ACTIVITIES/COMMUNITY CENTERS

Carrboro Parks & Recreation Department
Chapel Hill Community Center
Chapel Hill Department of Housing
Orange County 4-H
Orange County Special Olympics
Rainbow Soccer, Ltd.

SENIOR CITIZENS

Carol Woods Health Center
Chapel House
Hillhaven Rehabilitative and Health Care Center
Senior Times (O.C. Dept. on Aging)
Willow Springs Rest Home

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

ARIC HERNDON, *et al.*, Plaintiffs, v. CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION, *et al.*, Defendants.	AFFIDAVIT OF JOHN AND CHRISTIANA HERNDON Civil Action No. 1: 94-CV-00196

John and Christiana Herndon, being duly sworn, depose and say:

1. We are plaintiffs in this action and make this affidavit based upon our personal knowledge of the facts herein set forth.

2. We are the parents of Aric Herndon, also a plaintiff in this action, and a student at Chapel Hill High School.

3. As parents and Christians, we have always attempted to impart good values to our children. Through both word and deed, we have taught our children to have respect for others and, when appropriate, to help those who need it.

4. Our son Aric has learned these lessons well. He started volunteering when he was in third grade. In fifth grade, he decided on his own to join the Boy Scouts. He became extremely dedicated to his scouting activities and achieved the rank of Eagle Scout when he was only 14

years old. As a part of his scouting activities, he performed substantial community service and always enjoyed the service he provided to others.

5. When the Chapel Hill school district first started requiring kids to do community service, we were shocked to learn that Aric's scouting hours would not count toward community service credit because the school decided that Aric received compensation from his service in the form of merit badges. We understand that the school has now changed its policy concerning "double credit" for community service work. However, our objection to required community service is more fundamental.

6. We believe that the school district simply has no right to determine whether and under what circumstances our child will provide service to others. The school has made it clear that it is requiring community service in order to instill in our son a sense of obligation to others and to address certain problems in society. It is not within the public school's powers to determine what my son owes to the community or to others. We strongly believe that these decisions must be made as a family, free of outside influence or meddling.

7. As Christians, we also believe that where one volunteers and the type of service one provides to another should be a private matter. We object to having to put our charitable activities before school officials to see if they pass muster and will receive credit under the school's program.

8. Finally, we have always taught our son that a person cannot be forced to serve another against his or her will. People must choose for themselves whether or

not to volunteer. We firmly believe that our son's forced participation will override these important lessons we have taught him concerning service to others. As a result, our son will begin to look to the government, rather than his parents, for guidance concerning values and moral issues. We believe that erodes our authority as parents and violates the U.S. Constitution as well. Therefore, we have decided to challenge this program in court.

FURTHER AFFIANTS SAITH NOT.

/s/ John Herndon
John Herndon

/s/ Christiana Herndon
Christiana Herndon

Subscribed and sworn to before me this 14 day of November 1994.

/s/ Joe F. Denson Jr.
Notary Public, State of North Carolina

Joe F. Denson Jr., Notary Public Orange County, North Carolina
My Commission Expires 1/6/98

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

ARIC HERNDON, *et al.*, Plaintiffs, v. CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION, *et al.*, Defendants.	AFFIDAVIT OF JOHN AND ELLEN REINHARD Civil Action No. 1: 94-CV-00196

John and Ellen Reinhard, being duly sworn, depose and say:

1. We are plaintiffs in this action and make this affidavit based upon our personal knowledge of the facts herein set forth.

2. We are the parents of John Reinhard III, also a plaintiff in this action, and a student at Chapel Hill High School.

3. As parents, we have tried to provide moral guidance to our children on important choices that confront them now in the hope that they will carry these values and lessons with them throughout their entire lives. It is a responsibility we take very seriously, and have done so since their birth.

4. We believe that it is important for people to volunteer their efforts to help others in the community. Our family has spent many hours in support of charitable causes. Our son has joined in volunteering with us as

well. We did so because we and our son wanted to lend a hand to others.

5. Although we strongly support volunteer service, we strongly disagree with the way the school board has attempted to encourage it. The mandatory nature of the requirement has taken the self out of the selfless. It has debased and devalued the otherwise noble act of volunteering, reducing it to a requirement which, once done, will not be performed again.

6. We have always taught our children that the desire to help others must come from one's heart. People must freely choose whether or not to serve others and how this service will be carried out.

7. To us, mandatory community service is really an attempt by the school board to act as parents. School officials are expanding their control over our son into an area in which they have no authority to do so, supposedly to educate him about his responsibility to others. However, it is up to our family to determine our responsibilities to others.

8. Through their actions, they have expanded their authority well beyond the school and into our home. We feel this expansion of the school board's power into an area of family decision-making is a violation of our parental authority, and the important values we try to teach our son about service to others.

9. We firmly believe that our son's forced participation in this program will not teach him the value of helping others. We have already taught him that. Furthermore, we object to school officials determining what is

"acceptable" service to the community. Again, that is [sic] decision we will make as a family.

10. We believe the greatest lesson our son will receive from this program is that the government can force him to do something we always taught him was left up to his conscience. We believe that lesson seriously undermines our authority as parents. Moreover, the ultimate consequence of our son's forced participation in the program is that he will look to the government, as opposed to his parents, for guidance on matters of values and morality.

FURTHER AFFIANTS SAITH NOT.

/s/ John Reinhard
John Reinhard

/s/ Ellen Reinhard
Ellen Reinhard

Subscribed and sworn to before me
this 16 day of November 1994.

/s/ Joe F. Denson Jr.
Notary Public, State of North Carolina

My Commission Expires 10-25-98

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

ARIC HERNDON, *et al.*, Plaintiffs, v. CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION, *et al.*, Defendants.	Civil Action No. 1:94-CV-00196

JOINT STIPULATIONS OF MATERIAL FACTS

The parties submit the following stipulations of material facts relevant to the resolution of their motions for summary judgment:

1. Defendant Chapel Hill-Carrboro City Board of Education is a governmental agency and body corporate organized under the Education Code of North Carolina, N.C. Gen. Stat. § 115C-40. Its members are charged with administering the Chapel Hill-Carrboro City School system. The school system's high school, located in Chapel Hill, North Carolina, has a current enrollment of 2,061 students, grades 9-12.

2. Beginning with the 1993-94 school year, the Board of Education determined that students in grades 9 through 12, would be required to complete 50 hours of community service as a condition of graduation.

3. Students must perform the service after school, on weekends, holidays or over summer recess.

4. As originally proposed, students were required to perform a minimum of two (2) different types of service with at least two (2) different agencies or organizations. Under revised guidelines, students may perform the two (2) different services for a single organization. Clerical work is limited to no more than eight (8) hours. Fundraising activities are likewise limited to a total of eight (8) hours.

5. The community service coordinator at the school keeps a list of approved agencies and organizations on file. A copy of this list is attached as Exhibit A. Students are informed that they may work for other organizations to gain credit for service hours. As originally proposed, such student-initiated service was required to be pre-approved by the Service Learning Committee, a group of teachers, students and members of community organizations charged with administering the service program. Under revised guidelines, pre-approval of service is recommended in order to assure that student service will count toward credit, however, not required. The Service Learning Committee determines which service activities are eligible for credit. A sample of their deliberations on student requests for service credit is attached as Exhibit B. The principal of the high school is the final determiner for approving student-initiated service.

6. As originally proposed, students could not acquire community service credit for work performed at a nonprofit organization if that student received an independent benefit, such as an award or badge in return for the service. Under revised guidelines, students may receive merit badges in return for the service without barring inclusion toward credit.

7. Students cannot receive monetary compensation for service performed under the program nor may service performed as part of ordered restitution count toward credit.

8. Students must set their own work schedule and provide their own transportation. Organizations and agencies in which students perform their service are responsible for providing any training or necessary supervision.

9. When they arrive to perform their service, students must sign in with the agency and a contact person with the agency must document the hours the student works. Students must then turn over these verified time sheets to the school. A copy of this document is attached as Exhibit C. After performing the service, students must reflect on any memories or special feelings they gained from a particular service experience. A copy of this document is attached as Exhibit D.

10. After students complete the 50 hours of required service, they must submit a final report on their work experiences. A copy of the guidelines for this final project is attached as Exhibit E.

11. Failure to complete the program as specified makes a student ineligible for graduation. The program makes no provision for students and their parents who object to mandatory community service to opt out of the program.

12. Exhibit F is a copy of the revised guidelines of the program passed by the Service Learning Committee on October 31, 1994.

13. Plaintiffs Aric Herndon and John Reinhard III are currently students at Chapel Hill High School and subject to the mandatory community service requirement as a condition of graduation.

14. Plaintiff students state that they do not object to charity, but believe that charitable activities and community service work must be voluntary and left to an individual's conscience. They object to required participation in defendants' mandatory community service program.

15. Plaintiff students also desire to keep information concerning any service activities they may perform private.

16. Plaintiff parents state that they support private, charitable efforts and voluntary service to the community, but fundamentally believe that the decision to help others must always come from one's own conscience and that it cannot be imposed by the government. They attempt to impart these values to their children. As a result, they object to their childrens' participation in defendants' mandatory community service program.

17. Defendants state that the educational interests or purposes of the mandatory community service program are to help students:

– strengthen their ethics of social and civic responsibility;

– feel committed to addressing the underlying problems behind social issues;

– understand problems in a more complex way and imagine alternative solutions;

– recognize the contributions of different races, genders, and cultures;

– show respect for each person's rights, abilities, and special needs;

– develop a habit of critical reflection on their experiences, enabling them to learn more throughout life; and

– realize that their lives can make a difference.

Respectfully submitted,

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EXHIBIT A

March 1994

VOLUNTEER OPPORTUNITIES CURRENTLY ON FILE

(Come by Room A212 for more information and new listings added weekly)

ANIMAL SERVICES

Animal Protection Society
Orange County Animal Control

ARTS/LITERATURE

Ackland Art Museum
The ArtsCenter
Chapel Hill Arts & Music in Progress
N.C. Writer's Network
Orange County 4-H

CHILDREN/YOUTH SERVICES

Carolina Friends School
Carrboro Elementary After-School Program
Chapel Hill/Carrboro Head Start
Child Care Networks
Day Care Services
Ephesus Elementary After-School Program
Estes Hills Elementary After-School Program
FPG Elementary After-School Program
Glenwood Elementary After-School Program
Hargraves Recreation Center
Orange County 4-H Program
Orange-Durham Coalition for Battered Women
Seawell Elementary After-School Program
Street Scene Teen Center
Volunteers for Youth

COMMUNITY DEVELOPMENT & PLANNING

Chapel Hill Bicentennial
Chapel Hill-Carrboro Chamber of Commerce
Chapel Hill Downtown Commission/Volunteer Center
Chapel Hill/Orange County Visitors Bureau
Visitor's Center-Orange County

CRISIS, COUNSELING & SUPPORT SERVICES

Dispute Settlement Center
Orange County Rape Crisis Center
Orange Durham Coalition for Battered Women
Triangle Hospice
The Women's Center

EDUCATION

Chapel Hill-Carrboro Head Start Program
Center for Peace Education
Ephesus Elementary Science Lab
N.C. Health Careers Access Program
Orange County 4-H Club
UNC International Center

ENVIRONMENTAL HEALTH

Love Your Mother
New Hope Improvement Assoc./Streamwatch
Orange Community Recycling Program
SEAC

HEALTH SERVICES

American Cancer Society
American Heart Association
Group B Strep Association
Lineberger Comprehensive Cancer Center
Orange Cardiovascular Foundation
Ronald McDonald House

Triangle Hospice
UNC Hospitals
VA Medical Center

MENTAL HEALTH

Orange County Special Olympics
Residential Services, Inc.

MISCELLANEOUS

Center for Peace Education
UNC International Center

OUTDOOR WORK/LANDSCAPING

Carrboro Civic Club
Duke Gardens
Ephesus Elementary School
Habitat for Humanity
Orange County 4-H

PUBLIC/SOCIAL SERVICES

Carrboro Police Department
Chapel Hill Department of Housing
Chapel Hill Public Library
Habitat for Humanity
Interfaith Council for Social Services
Orange County Public Library
PTA Thrift Shop
UNC Public TV

RECREATIONAL ACTIVITIES/COMMUNITY CENTERS

Carrboro Parks & Recreation Department
Chapel Hill Community Center
Chapel Hill Department of Housing
Orange County 4-H
Orange County Special Olympics
Rainbow Soccer, Ltd.

SENIOR CITIZENS

Carol Woods Health Center
Chapel House
Hillhaven Rehabilitative and Health Care Center
Senior Times (O.C. Dept. on Aging)
Willow Springs Rest Home

EXHIBIT B

MEMORANDUM

TO: All Service Learning Committee members

FROM: Terry Gunnels, Service Learning Coordinator

RE: Vote needed on 2 issues

DATE: Monday, February 21, 1994

The Committee has been presented with requests from 2 individuals asking us to review their materials for possible approval as credit for service learning hours at CHHS. The first question relates to material from the Girl Scout Handbook concerning the Girl Scout Gold Award. A copy of this material was put in your mailbox by me on February 9, along with the memo about future Service Learning meeting dates. Barbara Glover, Girl Scout Leader, also attended our committee meeting last Tuesday to make her appeal. Please review the material she has given us (you might also review the minutes from last week's meeting, attached) and vote on her request.

The second issue was brought to me by Debbie Hooper, a substitute math teacher at CHHS. She and her husband are trying to run a summer day camp and

develop a proposed science and technology center. As you can see, they do not yet have non-profit status (but expect to get it shortly) and while I don't want to deny anyone with legitimate goals access to our wonderful students, neither do I want to provide a pool of free labor for any activity. Please review this material also and vote on her request. Thank you for your time and input!

#1 GIRL SCOUT GOLD AWARD

Senior Girl Scouts earning their Gold Award should be allowed to count some/all of these 15 hours as credit for Service Learning.

YES ___ NO ___

COMMENTS _____

_____

#2 IMAGINEERING CENTER

Students should be allowed to perform service learning hours for credit by clearing hiking trails for the Imagineering Center.

YES ___ NO ___

COMMENTS _____

_____

EXHIBIT C

CHAPEL HILL HIGH SCHOOL
SERVICE LEARNING PROGRAM
SERVICE AGENCY SIGN-IN SHEET

Name of Agency: _____ Phone: _____

Name of Student	Type Activity	# Hours	Verified By	Date
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				
16.				
17.				
18.				
19.				
20.				

SIGNATURE OF AGENCY REPRESENTATIVE: _____

DATE: _____

EXHIBIT D

TO BE COMPLETED BY THE STUDENT AFTER EACH SERVICE LEARNING ACTIVITY:

SERVICE LEARNING PROGRAM
STUDENT SERVICE RECORD

NAME _____ CLASS _____

NAME OF SITE	#OF HOURS	DATE PERFORMED	VERIFIED BY

Briefly describe your duties and any special feelings or memories you have from this experience:

NAME OF SITE	#OF HOURS	DATE PERFORMED	VERIFIED BY

Briefly describe your duties and any special feelings or memories you have from this experience:

EXHIBIT E

CHAPEL HILL HIGH SCHOOL
SERVICE LEARNING PROGRAM
EXPERIENCE SUMMARY FORM

AT THE COMPLETION OF YOUR 50 HOURS OF SERVICE LEARNING, CHOOSE ONE SITE WHERE YOU PERFORMED YOUR VOLUNTEER SERVICE AND REFLECT ON YOUR EXPERIENCES IN A 1-2 PAGE PAPER. THE FOLLOWING QUESTIONS MAY BE USED AS GUIDELINES OR IDEAS FOR DISCUSSION.

1) How have you changed/grown from your service learning experience? (e.g., changes in attitudes, changes in actions toward others, changes in feelings about self, new career interests, etc.). What kind of new skills have you learned?

2) What did you contribute? What did other people learn from you?

3) What were your first impressions of the people served? Have those first impressions changed any? What did you learn about the people you helped?

4) Were you surprised by anything that took place or do you have a special memory or a funny story to tell?

5) Can you suggest changes regarding your placement experience that would help the agency serve clients better?

6) What tips/suggestions could you offer new volunteers doing this type of service?

7) What happened that made you feel you would (or would not) like to do this as a career?

8) What do you see is the value of doing community service?

9) Will you continue to perform volunteer service in the future?

EXHIBIT F

Regulation IHF-R- Revised 10/31/94

Service Learning Requirement

Beginning with the graduating class of 1997, students will be required to complete fifty (50) hours of service learning in order to receive a diploma. The hour requirements for students who transfer into the high school after the ninth grade will be prorated as follows: forty (40) hours for students entering as sophomores; thirty (30) hours for students entering as juniors; and twenty (20) hours for students entering as seniors.

Service learning is defined as follows:

1. Active involvement in projects which meet basic human, societal, community, educational, environmental, or public safety needs of others beyond the students and their families in the school, local, state, national or international community;

2. Learning through community-based, hands-on experiences;

3. An opportunity for students to apply, practice and demonstrate skills and knowledge acquired through their formal education;

4. A reciprocal relationship of both giving and receiving between the student and the person or group who is being helped;

5. The development of responsible citizenship.

The principal is the final determiner for approving service learning hours. It is intended that service which meets this general definition of service learning be approved with only the following restrictions being applied:

1. Students are required to participate in at least two (2) different service learning activities, thereby applying different skills to serve the community. Both types of activities may be provided through the same agency. Time spent formally organizing and planning the activity or participating in training can be counted as long as the hours can be quantified and verified. Such planning must be a part of active, documented involvement.

2. Activities for which students are personally compensated or which are required as a form of restitution cannot be counted toward the service learning requirement. The service cannot be provided to a for-profit organization unless it provides a benefit to their clients that they otherwise would not receive. Service that is provided through an organization such as a church or student club, which is primarily for the benefit of the

members will not be approved; (e.g. raising funds for a trip).

3. Activities which promote political parties or individual candidates cannot be counted. Activities can be counted which involve studying and/or advocating for important community needs as long as such studying leads to formal recommendations for action and students remain involved until the project is presented or completed.

In order to receive credit for service learning activities, students must receive approval from the principal or designee as verified by a signature on a form provided by the high school. Prior approval of service learning activities is advisable but not required. No more than twenty-five (25) hours may be earned during the summer months immediately prior to the first day of school of the 9th grade year.

After completing the required number of service learning hours, submitting the required documentation, and receiving the necessary approvals, students must prepare and submit a summary of their service learning experience which provides them with an opportunity to reflect on the entire service learning experience.

Supreme Court, U.S.
FILED
DEC 31 1996
CLERK

No. 96-846

96-848

In The

Supreme Court of the United States

October Term, 1996

JOHN REINHARD III, JOHN REINHARD, and ELLEN REINHARD,

Petitioners,

v.

CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION; KEN TOUW; SUE BAKER; LaVONDA BURNETTE; MARY BUSHNELL; JUDITH ORTIZ; MARK ROYSTER; RUTH ROYSTER; and NEIL G. PEDERSEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Do parents have a fundamental right under substantive due process to exempt their child(ren) who attend public school from State and/or local educational requirements with which the parents disagree on secular, value-based grounds?

(2) Is a public school student's decision over when to perform community service so "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), that it qualifies as one of the limited set of core personal decisions recognized under the doctrine of substantive due process as fundamental?

PARTIES TO THE PROCEEDINGS

With respect to the parties named in the caption, Respondents state that Respondent, The Chapel Hill-Carrboro City Board of Education, is a public body and body politic and corporate created and existing under the General Statutes of North Carolina and has general control and supervision of all matters pertaining to the public schools in its respective local school administrative unit, (district), The Chapel Hill-Carrboro City Schools, for and on behalf of the State of North Carolina. Pursuant to Supreme Court Rule 29.6, The Chapel Hill-Carrboro City Board of Education affirmatively states that (1) it is not a publicly held corporation or other publicly held entity; (2) it is not a parent, subsidiary or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity; and (3) there are no other publicly held corporations or other publicly held entities that have a direct financial interest in the outcome of the litigation. Respondents Ken Touw, Sue Baker, LaVonda Burnette, Mary Bushnell, Judith Ortiz, Mark Royster and Ruth Royster, were and are sued in their official capacities as the duly elected members of The Chapel Hill-Carrboro City Board of Education at the time of the adoption of the Service Learning Program, which is the subject matter of this action. The present duly elected members of The Chapel Hill-Carrboro City Board of Education are Mary Bushnell, Elizabeth Carter, Nicholas Didow, Harvey Goldstein, Bea Hughes-Werner, Mark Royster and Ken Touw. Respondent Neil G. Pedersen was and is sued in his official capacity as the duly appointed

PARTIES TO THE PROCEEDINGS – Continued

Superintendent of The Chapel Hill-Carrboro City Schools. Dr. Pedersen continues to serve in this office.

Further, Respondents acknowledge that Aric Herndon and his parents, Christiana and John Herndon, were plaintiffs in the original proceedings in the district court and on appeal to the Fourth Circuit. Upon information and belief, the Herndon family has subsequently moved outside of the local school administrative unit, (district), of The Chapel Hill-Carrboro City Schools for reasons unrelated to this litigation and as a result, Aric Herndon is no longer subject to the requirements of the Service Learning Program instituted by The Chapel Hill-Carrboro City Board of Education and the subject matter of this actior..

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 89 F.3d 174 (4th Cir. 1996), and is reprinted in the Petitioners' Appendix. Pet. Writ A-1-17. The opinion of the United States District Court for the Middle District of North Carolina is reported at 899 F. Supp. 1443 (M.D.N.C. 1995), and is reprinted in the Petitioners' Appendix. Pet. Writ A-20-51.

JURISDICTION

Petitioners ask the Court to exercise its discretionary power to reverse the decision of the United States Court of Appeals for the Fourth Circuit entered July 11, 1996 in the case of *Aric Herndon, et al. v. Chapel Hill-Carrboro City Board of Education* reported at 89 F.3d 174 (4th Cir. 1996) and reprinted in the Petitioners' Appendix. Pet. Writ A-1-17, pursuant to 28 U.S.C. § 1254(1). While the Court has the power to grant discretionary review, for the reasons set forth in this Brief in Opposition, the Court should not exercise that discretion in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, amendment XIV

SECTION 1. . . . [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

42 U.S.C. § 1983

Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT OF THE CASE

A. Statement of Facts

Parents, students, teachers and national, state and local officials throughout our nation are continuously debating how to best teach and provide young people with the qualities necessary for good citizenship, successful learning and favorable employment. The duly elected members of the Chapel Hill-Carrboro City Board of Education have decided that "service learning", an experienced-based program in which students select a community service project, go out into the community to perform the service, and reflect on and write about the activity once it is complete, (the "Service Learning Program") is one effective way to achieve these goals. Many other school districts, including those in the City of Atlanta and throughout the entire State of Maryland, have adopted similar service learning requirements.

The facts of this case are not in dispute. *See Joint Stipulations of Material Facts* Pet. Writ A-58-73. The Service

Learning Program is a graduation curriculum requirement for students attending Chapel Hill High School ("CHHS") and, now, East Chapel Hill High School ("ECHHS")[1]. The Service Learning Program provides students with a three-stage program designed to teach them qualities important to citizenship, learning and employment. First, students select and help plan their service project, including setting their own work schedule and arranging for their own transportation. Through these activities, students learn to assess the issues facing their community and to develop a strategy for addressing them.

Second, students spend 50 hours over their four years of high school (or an average of just over one hour per month) performing a service learning project. In performing service, students learn that they can make a difference in addressing community issues. Respondents contend that engagement in these real-world tasks further allows students to develop a wider range of personal, intellectual, academic and social skills, that will help them become effective citizens, students, leaders, colleagues and employees.

Third, students reflect on and write about the service they have performed. Students choose their own discussion topic and can convey positive or negative thoughts about their service experience. Reflection and writing

---

[1] The Chapel Hill-Carrboro City Board of Education opened at new, additional high school, East Chapel Hill High School in the fall of 1996. The students attending ECHHS are subject to the same graduation requirements of the Service Learning Program as are their counterparts attending CHHS.

both sharpens students' critical thinking and writing skills and enhances their awareness of the service they have performed.

Research has substantiated service learning's effectiveness in achieving these educational goals. Briefly stated, the research demonstrates that service learning: (1) improves academic performance and engagement in learning; (2) increases ability to solve complex problems in real-world situations; (3) improves communication, cooperation, leadership, organization and other skills necessary for successful citizenship and employment; (4) increases self-esteem; (5) increases personal and civic responsibility; (6) decreases anti-social behaviors; and (7) exposes students to different vocations. These qualities are essential to responsible citizenship, successful learning and to workplace success. *See generally*, Daniel Conrad & Diane Hedin, *High School Community Service: A Review of Research and Programs* (1989); Robert Shumer, *Community-based Learning: Humanizing Education*, 17 J. Adolescence 357 (1994); Robert Shumer, *A Report from the Field: Teachers Talk About Service Learning* (1994); Charles Harrison, *A Carnegie Foundation Special Report: Student Service* (1987); Fred M. Newman & Robert A. Rutter, *The Effects of High School Community Service Programs on Students' Social Development* (1983); Kathy D. Tuck, *An Evaluation of the Community Service Initiative (Pilot Project in the D.C. Public Schools)* (1992); Jane Maland & Thomas H. Berkas, *Excellence in Action: The Community Service-Learning Program* (1993); Miranda Yates & James Youniss, *A Developmental Perspective on Community Service in Adolescence*; Dwight Giles, Jr. & Janet Eyler, *The Impact of a College Community Service Laboratory on Students' Personal,*

Social and Cognitive Outcomes, 17 J. Adolenscence 327 (1994); Stephen F. Hamilton & R. Shephard Zeldin, *Learning Civics in the Community*, 17 Curriculum Inquiry 407 (1987); and Judith A. Boss, *The Effects of Community Service Work on the Moral Development of College Ethics Students*, 23 J. Moral Educ. 183 (1994).

Petitioners, John Reinhard III, and his parents, John Reinhard and Ellen Reinhard, (the "Petitioners") ask the courts to interfere with the management of the schools by striking down this curricular requirement. Petitioners allege that the Service Learning Program violates: (1) parents' substantive due process rights to control the upbringing of their child(ren); and (2) students' substantive due process liberty rights.[2] Petitioners dispute is based upon secular, value-based grounds and they concede " 'the basic legitimacy' of the Respondents' interest in teaching students the value of service, and that the service requirement is rationally related to that interest." *Herndon v. Chapel Hill-Carrboro City Board of Educ.*, 899 F. Supp. 1443 (M.D.N.C. 1995), *aff'd* 89 F.3d 174, ___ (4th Cir. 1996). *See* Pet. Writ A-11.

B. Proceedings Below

Respondents accept the statements of the Petitioners in their Writ for Certiorari regarding the proceedings below. Pet. Writ 5-6.

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[2] While Petitioners also raised a student privacy claim before the District Court and a Thirteenth Amendment claim before the District Court and the Fourth Circuit, they have limited their Petition to Fourteenth Amendment parental and personal liberty guarantee claims. Pet. Writ p. 5, n. 8.

REASONS FOR DENYING THE PETITION

"The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes; first, to secure uniformity of decisions between and among those courts, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

There is no split of authority, nor striking deviation from the acceptable and usual course of judicial proceedings, nor any confusion about the application of the law upon which to call the Court's supervisory power into play. In actuality, Petitioners are using this opportunity to ask the Court to set a new standard of judicial review where questions of parental rights to direct the education of their child(ren) enrolled in public schools and student liberty claims are concerned. But, Petitioners have advanced no legal basis or precedent for the establishment of the fundamental right of parents or students under the Constitution to opt out of a public school educational curriculum requirement for graduation for purely secular reasons. Further, the decision which Petitioners ask the Court to review is entirely in accord with the two other reported decisions involving public school community service graduation requirements. *See Steirer v. Bethlehem Area Sch. Dist.*, 789 F. Supp. 1337 (E.D. Pa. 1992), *aff'd* 987 F.2d 989 (3rd Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 85 (1993) (rejecting First and Thirteenth Amendment challenges); *Immediato v. Rye Neck Sch. Dist.*, 873 F. Supp. 846 (S.D.N.Y 1995); *aff'd* 73 F.3d 454 (2nd Circuit), *cert. denied*, ___ U.S. ___, 117 S.Ct. 60 (1996)

(rejecting parental rights, student liberty, student privacy and Thirteenth Amendment challenges).

In the cases at bar, the District Court denied all of Petitioners' claims, and the Fourth Circuit affirmed that decision. *Herndon v. Chapel Hill-Carrboro City Board of Educ.*, 899 F. Supp. 1443 (M.D.N.C. 1995), *aff'd* 89 F.3d 174 (4th Cir. 1996) (rejecting parental rights, student liberty, student privacy and Thirteenth Amendment challenges).

For these reasons and those set forth below, the Court should deny the Petition for a Writ of Certiorari in this case.

I. PETITIONER PARENTS HAVE NO FUNDAMENTAL RIGHT TO EXEMPT THEIR CHILD FROM EDUCATIONAL REQUIREMENTS TO WHICH THEY OBJECT ON SECULAR GROUNDS.

Petitioners advance their parental rights claim under the doctrine of substantive due process. The Court recently stated that "guideposts for responsible decision-making in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights*, ___ U.S. ___, 112 S. Ct. 1061, 1068 (1992) (citation omitted). *See Bowers v. Hardwick*, 478 U.S. 186, 194-98 (1986) and *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

This caution manifests itself in the standard of review. Courts distinguish between "fundamental" rights and all other substantive due process rights. Where the

State policy interferes with a "fundamental" right, courts will uphold the policy only if it is narrowly tailored to serve a "compelling state interest." *See Reno v. Flores*, ___ U.S. ___, 113 S. Ct. 1439, 1447 (1993). *See San Antonio Indep. Sch. Dist. v. Rodriquez*, 411 U.S. 1, 27-40 (1973). With respect to all other, non-fundamental rights, however, the courts will uphold the policy so long as it "meet[s] the (unexacting) standard of rationally advancing some legitimate governmental purpose." *See Reno*, 113 S. Ct. at 1449; *See generally*, John E. Novak & Ronald D. Rotunda, *Constitutional Law* § 11.4 at 374 (4th ed. 1991). This "rational basis review" standard is grounded in the judiciary's deference to the legislative branches and its respect for our democratic system.

A. The proper standard of review for secular, values-based parental challenges is rational basis review

The District Court held that "the right of individual parents to exert pre-emptive control over the curriculum of public schools is not a 'fundamental' one subject to 'strict scrutiny' " *Herndon*, 899 F. Supp. at 1450; *See* Pet. Writ A-34 and that rational basis review applies to the parental rights claim. *Id.* at 1452; *See* Pet. Writ A-38. The lower court further held that the service learning requirement is rationally related to the legitimate state interest of educating students enrolled in public schools and in preparing them for participation in society as citizens. *Id.* at 1453; Pet. Writ A-40.

It is well settled that the running of public schools is a matter for the state and local officials to which the

judiciary has traditionally deferred. *See e.g. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); *Wood v. Stickland*, 420 U.S. 308, 326 (1975); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). However, in the instant case, Petitioners ask the Court to declare as "fundamental" parental rights to exempt their child(ren) from educational requirements with which they philosophically disagree. The right asserted is the right of individual parent to exert pre-emptive control over the curriculum of public schools based upon wholly secular objections to that curriculum.

Courts have long recognized that an educated citizenry is of great importance to a democratic society, and that the State therefore has a strong interest in the education of its citizens. The Court has held that "[p]roviding public schools ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

Given this important State interest in education, courts have never recognized a fundamental right of parents to exempt their child from educational requirements to which they object on secular grounds. Instead, the Court has consistently reviewed secular parental challenges to State educational requirements under the rational basis standard that the lower court correctly applied in this case. In *Runyon v. McCrary*, the Court explained that it "has repeatedly stressed that . . . [parents] have no constitutional right to provide their children with . . . education unfettered by *reasonable* government regulation." *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (emphasis added). *Wisconsin v. Yoder* stated that "[t]here is no doubt as to the power of a State, having a high responsibility for

education of its citizens, to impose *reasonable* regulations for the control and duration of basic education". *Yoder*, 406 U.S. at 213 (emphasis added).

Courts have consistently applied rational basis review to parental "values-based" challenges to school policy. In *Wisconsin v. Yoder*, for example, the Court made absolutely clear that its application of heightened scrutiny applied only "when the interests of parenthood are combined with a free exercise claim," and did *not* apply to parental objections based on secular values. *Yoder*, 406 U.S. at 233. *Yoder* thus established that "[a] way of life, however virtuous and admirable, may not be interpreted as a barrier to reasonable state regulation of education if it is based on purely secular considerations." *Yoder*, 406 U.S. at 215; *see also Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969), *aff'd* 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970) (affirming district court's application of rational basis review to parents' secular objections to state sex education curriculum).

The teaching of "values" is not alien to the mission of the public schools. To the contrary, the Court has recognized that:

> [p]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensible to the practice of self-government in the community and the nation.

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. Beard & M. Beard, *New Basic History of the United States*, 228 (1968)); *accord Ambach v. Norwick*, 441

U.S. 68, 76 (1978); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

In *Immediato v. Rye Neck School Dist.*, parents challenged a service learning requirement in all material respect identical to the present one. The Southern District of New York correctly held that "no federal caselaw . . . recognizes a protected parental right for students to opt out of an educational curriculum for purely secular reasons." *Immediato v. Rye Neck School Dist.*, 873 F. Supp. 846, 852 (S.D.N.Y. 1995). The lower court applied rational basis review and upheld the service learning requirement.

Many other courts have similarly refused to recognize a "fundamental" right of parents to exempt their child from educational requirements to which they object on secular grounds, and have applied rational basis review to such claims. *See e.g., Murphy v. Arkansas*, 852 F. 2d 1039 (8th Cir. 1988); *Null v. Board of Educ.*, 815 F. Supp. 937, 939 (S.D. W. Va. 1993); *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1455-58 (E.D. Mich. 1989); *Gonyaw v. Gray*, 361 F. Supp. 366, 369 (D. Vt. 1973); *Ware v. Estes*, 328 F. Supp. 657, 658-59 (N.D. Texas 1971); *Care and Protection of Charles*, 504 N.E.2d 592, 600 (Mass. 1987); *State v. Shaver*, 294 N.W.2d 883, 889 (N.D. 1980).

In a decision upholding the Arkansas Home School Act against parental challenge, the Eighth Circuit summed up this body of caselaw:

> we find no persuasive argument advanced that there is a fundamental right of parents to supervise their children's educatior . . . The recognition of such a right would fly directly in the face

> of those cases in which the Supreme Court has recognized the broad power of the state to compel school attendance and regulate curriculum.

Murphy, 852 F.2d at 1043;[3] *see also State v. DeLaBruere*, 577 A.2d 254, 274 (Vt. 1990) ("all courts that have confronted defendants' argument here have rejected it and held that the parents' rights must give way to reasonable state regulation").

In the face of compelling authority, Petitioners incredibly maintain that there is ambiguity in the law regarding parents' rights to exempt their child from the school curricular requirements to which they object on secular grounds.

Petitioners argue, first, that the Court's decisions from the early part of this century, *Pierce v. Society of Sisters*, 267 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), support a higher standard of review. In *Pierce*, a private school challenged an Oregon statute requiring children between the ages of eight and sixteen to attend public school and making it a misdemeanor for parents to send their child to private school. *Pierce*, 268 U.S. at

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[3] The Court in *Murphy*, addressed this point in the context of considering plaintiffs' equal protection claim. *Murphy v. Arkansas*, 852 F.2d 1039, 1043-44 (8th Cir. 1988). The issue of whether parents' right to control the upbringing of their children is "fundamental," however, remains the same whether raised in the context of equal protection or of privacy. The *Murphy* court, in next considerating the parents' privacy claim, accordingly applied rational basis review to this claim as well. *Id.* at 1044. Because the standard of review is the same under either of these claims, *Murphy* is applicable to the parental claims currently before the Court.

530-33. In *Meyer*, a private school teacher challenged a Nebraska law making it a misdemeanor to teach any language other than English to students below the eighth grade. *Meyer*, 262 U.S. at 396-97.

While the Court struck down both statutes under the Due Process Clause, it did so because these statutes had "no reasonable relation to some purpose within the competency of the State." *Pierce*, 268 U.S. at 535, *see also Meyer*, 262 U.S. at 403 ("the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State"). The Court thus applied "rational basis review". Accordingly, both *Pierce* and *Meyer* support the lower court's holding that rational basis review is the property standard in this case.[4] Courts have consistently interpreted these cases in this way. *See Baker v. Owen*, 395 F. Supp. 294, 299 (M.D.N.C. 1975) (*Meyer* and *Pierce* apply rational basis review and do not establish a fundamental right); *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1456 (E.D. Mich. 1989) (*Pierce* and *Meyer* employ a reasonableness standard, not strict scrutiny).

Even if *Pierce* and *Meyer* supported Petitioners' chosen standard of review (and they do not), the question addressed in those cases is distinguished from the instant case. In both *Pierce* and *Meyer* what troubled the Court was that the policies at issue pre-empted the entire field of education, both public and private, and thereby robbed

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[4] Further, *Pierce* states that there is "[n]o question . . . concerning the power of the State reasonably to regulate all schools . . . [and] to require . . . that certain studies plainly essential to good citizenship must be taught." *Pierce*, 268 U.S. at 534.

parents of all choice. Both decisions explicitly recognized that the policies would be constitutional if limited to the public school context and acknowledged the State's "power to prescribe a curriculum for institutions which it supports". *See Meyer*, 262 U.S. at 402; *Pierce*, 268 U.S. at 535. The Court has accordingly held that *Pierce*

> lent 'no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society' but rather 'held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools.'

Runyon 427 U.S. at 177 (quoting *Yoder*, 406 U.S. at 239 (White, J., concurring)). *Pierce* and *Meyer* do not require this Court to strike down the Service Learning Program requirement which applies only to public schools.

The other cases that Petitioners rely on do not concern school curriculum at all. For example, the decision in *Jordan by Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994), concerns a parental challenge to the State's removal of their child from the home for three days without allowing the parents access to him nor allowing judicial review of the action. *Id.* at 336-37. Respondents do not dispute that parents have a fundamental right to "retain custody over" their child(ren), as held in *Jordan*, *Id.* at 342, and that the State cannot take a child out of the home without showing something more that a "rational basis." But it does not follow that the State must justify its public school curricular choices on a "compelling interest" standard where these policies do not impact on the parents'

"custody" of their child. The proper standard for this case, as the courts have consistently held is rational basis review.[5]

Petitioners' reliance on *Alfonso v. Fernandez*, 606 N.Y.S. 2d 259 (N.Y. App. Div. 1993) and on *dicta* in *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995), is similarly misplaced. The parents in these cases challenged school condom distribution policies, not aspects of the educational curriculum. *See Id.* at 583; *Alfonso*, 606 N.Y.S. 2d at 261. These cases do not address the right asserted in this case, i.e. the right to exempt one's child from curricular requirements to which the parents disagree on secular grounds, but rather a "parenting right . . . to influence and guide the sexual activity of their children without State interference." *Alfonso*, 606 N.Y.S. 2d at 266. Even if this right were "fundamental" (and Respondents do not concede this), it would not be implicated by the present case which manifestly does not involve children's sexual activity.[6]

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[5] In contrast to *Runyon* and *Yoder, supra*, which directly address the question of secular parental objections to the school curriculum, the Court dicta cited by Petitioners - language from cases such as *Griswold v. Connecticut* or *Roe v. Wade* - do not even touch on this point. *See* Pet. Writ p. 14. Thus, the controlling cases here are plainly *Runyon* and *Yoder, supra*.

[6] *Curtis* makes clear that educational policies, in contrast to policies implicating children's sexual activity, are "unquestionably entrusted to the control, management and discretion of State and local school committees." *Curtis* 652 N.E. 2d at 584. This is consistent with the Massachusetts Supreme Court's own decision in *Care and Protection of Charles*, 504 N.E.2d 592 (Mass. 1987) in which that Court applied rational basis review to parental challenges to State curricular decisions. The

The Court has recently instructed that " '[s]ubstantive due process' analysis must begin with a careful description of the asserted right." *Reno v. Flores*, ___ U.S. ___, 113 S. Ct. 1439, 1447 (1993). The right asserted in this case is not a parental right to the "custody" of their child, as was the case in *Jordan*, nor even a right to guide the sexual activity of their child, as was the case in *Alfonso* or *Curtis*. Rather, the lower court properly described in the right asserted in this case as "the right of individual parents to exert pre-emptive control over the curriculum of public schools" based upon wholly secular objections to that curriculum. Controlling authorities make clear that this right is not fundamental.

Plaintiffs maintain that the common law recognized a parental right to exempt their child from curricular requirements on secular, values-based grounds, and that this is sufficient to deem the right "fundamental." Many common law decisions, however, *uphold* the action of the local school authority against parental "values" claims under a reasonableness test.[7] Even if the common law did

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Curtis court cites *Charles* with approval. *Curtis*, 652 N.E.2d at 585 n. 8.

[7] *See, e.g., Cross v. Trustee Walton Graded Sch.*, 110 S.W. 346 (1908) (student's suspension for refusal, supported by parents, to participate in play was proper and within school's authority to prescribe and enforce rules for control and management of the school); *State ex rel. Andrew v. Webber*, 8 N.E. 708 (1886) (upholding expulsion of student who, at direction of father, refused to participate in required music course); *Kidder v. Chellis*, 59 N.H. 473 (1879) (rejecting parents' and students' claim they had right to exclude student from "declaiming" in school and upholding teacher's right to expel student for failure to conform to declamation rule); *State v. Mizner*, 50 Iowa 145

support Plaintiffs' view (it does not), this is not sufficient to show that a right is "implicit in the concept of ordered liberty" and, hence, "fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

One reason that courts have resisted applying this higher standard is because it would subject virtually the entire school curriculum to constitutional attack. Almost every course or school activity communicate some value or another. For example, parents who do not value competitiveness might wish to have their child exempted from gym class. Others might object to school curricula that seek to include non-Western writers or history. "Parents may have 'value' based secular objections to many subjects, such as sociology, literature, or biology and will be tempted to seek intervention by the federal courts to have their children exempted from various classes, exercises, examinations and activities." *Immediato*, 873 F. Supp. at 852. In short, under Plaintiffs' theory the courts would become enmeshed with many components of the curriculum. This is the very evil that the Supreme Court has counseled against in urging courts to employ "self-restraint" in the area of substantive due process. *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992); *See also*

(1878) (Teacher authorized to expel student who refused to study algebra pursuant to parents' instructions); *Sewell v. Board of Educ. of Defiance Union Sch.*, 29 Ohio St. 89, 91-92 (1876) (upholding suspension of student due to student's refusal to participate in rhetoric class); *Ferrier v. Tyler*, 48 Vt. 444 (1876) (school board's power to determine curriculum and compel attendance overrides parent's power to determine what subjects children will study).

McCollum v. Board of Educ., 333 U.S. 203, 235 (1948) (Jackson, J.) ("[n]othing but educational confusion and discrediting of the public school system can result from subjecting it to constant law suits").

B. The service learning program easily passes muster under rational basis review

Under rational basis review, petitioners bear a "heavy burden," *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981), to show that the program bears no "reasonable relation to some purpose within the competency of the State to effect." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Petitioners have not met this burden here. The central purpose of public schools is to instill the qualities necessary for successful citizenship and employment. *See, e.g., Ambach*, 441 U.S. at 76; *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); As the lower court found, it is reasonable to conclude that service learning teaches students "academic and social skills – such as teamwork, problem solving, negotiation, communication, planning and evaluation – that will help them become effective employees, colleagues, citizens and leaders." The Service Learning Program accordingly passes the rational basis test, and the Petitioners parental rights claim must be rejected.

II. STUDENTS' LIBERTY INTERESTS DO NOT RENDER THE SERVICE LEARNING PROGRAM UNCONSTITUTIONAL.

Petitioners' claim that the Service Learning Program invades that very limited set of core personal choices recognized under the "liberty" component of substantive

due process analysis as requiring "strict scrutiny." *See generally, Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. at 2806-07. The lower court held that "there is no basis to find that the students' due process rights should be examined any differently than those of their parents." *Herndon*, 899 F. Supp. at 1453. *See*, Pet. Writ. A-41.

Substantive due process does not protect every choice an individual might seek to make. Rather, the Court has applied strict scrutiny only to claims involving a discrete set of "a person's most basic decisions." *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 2806 (1992). The Court has described in plain terms the narrow scope of personal decisions that are protected under this doctrine. *Id.* at 2807; *see also Whalen v. Roe*, 429 U.S. 489, 600 & n.26 (1977). The decision whether and how to serve others nowhere appears on this list. To our knowledge, no judicial decision has ever identified this decision as one that is so "basic" to personhood that it must be protected under a compelling interest standard against the actions of duly elected State officials.

Petitioners maintain that there is a "long-established common law principle" prohibiting State-required community service. Community service, however, was central to two institutions dear to the Framers of the Constitution, to wit: military service and jury duty. *See, e.g.* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 29 U.C. Davis. L. Rev. 1169, 1170 (1995) ("the 'militia' and the 'jury' were twin duties of good citizenship") Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1162-73, 1181-95 (1991) (discussing the role of the conscripted militia and the citizen jury in the

Framers' constitution). Moreover, both English and early American communities required people to serve the community by constructing public roads. *Butler v. Perry*, 240 U.S. 328, 331 (1916), ("[f]rom Colonial days to the present time" citizens have been asked to help construct and maintain the community's roads) (citation omitted). The well-documented history of required community service in militias, on juries and building roads conclusively demonstrates that no traditional "ban" on state-required community service has ever existed.

It especially should not apply in the school context. Petitioners continually portray service learning as requiring students to work. They neglect that the Service Learning Program, even more than the militia, jury and road building duty the Framers' found acceptable, is an educational vehicle designed to impart important skills for citizenship, learning and employment. The Court recently emphasized that the scope of the rights the Constitution affords schoolchildren is limited to "what is appropriate for children in a school" and that "Fourteenth Amendment rights . . . are different in public schools than elsewhere." *Vernonia Sch. Dist. 47J v. Acton*, ___ U.S. ___, 115 S. Ct. 2386, 2392 (1995); *see also, Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995); *Doe v. Superintendent of Sch.*, 653 N.E.2d 1088, 1097 (Mass. 1995). It would be especially inappropriate for a court to recognize a new substantive due process right as a protection against a duly elected school board's curricular requirement.

CONCLUSION

Local elected officials and educators of The Chapel Hill-Carrboro City Schools has decided to use service learning to foster the qualities of good citizenship, successful learning and successful employment. The present action asks the Court to engage in expansive constitutional interpretations that are at odds with the controlling case law in order to call a halt to this educational practice. United States District Judge Bullock properly rejected this invitation, stating

> it is not up to the federal courts to determine who should teach, what to teach and how it should be taught. The Chapel Hill-Carrboro City Board of Education is made up of duly-elected officials who have discretion in establishing a curriculum for Chapel Hill High School. Plaintiffs retain the right to seek change by supporting, along with their neighbors, school board candidates who would cancel or revise the community service program.

Pet. Writ A. 47.

For the foregoing reasons, certiorari should be denied and United States District Judge Bullock's Order, granting, in its entirety, Respondents' (Defendants') motion for summary judgment, as affirmed by the United

States Court of Appeals for the Fourth Circuit, should be allowed to stand.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

JOHN REINHARD III, JOHN REINHARD, and ELLEN REINHARD,

Petitioners,

v.

CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION; KEN TUOW, SUE BAKER, LAVONDA BURNETTE, MARY BUSHNELL, JUDITH ORTIZ, MARK ROYSTER, RUTH ROYSTER; and NEIL G. PEDERSEN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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I. PARENTAL LIBERTY

Petitioners ask this Court to review the Fourth Circuit's holding that Fourteenth Amendment parental liberty rights are non-fundamental, and its determination that government programs or laws that violate these rights need only be subject to rational basis review. In its opposition brief, the Chapel Hill-Carrboro City Board of Education ("the school district") blatantly mischaracterizes the issue presented in the Reinhard family's petition. The issue in the instant case is not and never has been whether parents may "exert pre-emptive control over the curriculum of a public school." Respondents' Brf. at 8. As the Fourth Circuit recognized, the issue is whether the Fourteenth Amendment right of parents to direct their children's education in any context is fundamental or non-fundamental. *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 177 (4th Cir. 1996); A-7.

Reduced to its essence, the question is not whether parents may dictate curriculum, but whether they have *any* rights with regard to their children's education. Moreover, the Fourth Circuit's holding is sweeping in its repudiation of parental rights: it applies equally to parents who educate their children at home or send them to a private school, in addition to those who send their children to public schools. The Fourth Circuit declares that no parent has a fundamental right to direct their children's education. *See Herndon*, 89 F.3d at 177-79; A-7-11.

The school district in its opposition brief hardly attempts to respond to petitioners' arguments concerning the primary role of parents in directing the education of

children. *See* Petition at 14-20.[1] Perhaps the school district recognized that it would be difficult to counter the overwhelming evidence from history and case law recognizing parental rights as one of the foundations of our Nation. Instead, the school district devotes almost its entire opposition brief to both mischaracterizing opinions from this Court and elsewhere and engaging in alarmist rhetoric concerning the supposed "consequences" of recognizing parental liberty rights. These incorrect contentions are addressed below.[2]

The Fourth Circuit opinion, barely mentioned by the school district in its opposition brief, provides perhaps the best rebuttal of the school district's arguments, for it

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[1] In its only counter to petitioners' argument from history and tradition, the school district claims that some common law decisions actually ruled against parents when disputes arose between families and educational officials. Respondents' Brf. at 16 n.7. Some courts did reject the claims of parents, but even in such cases, the underlying *rights* of parents were never questioned; the balance in those particular cases merely was struck on the side of the State.

[2] The school district also cites evidence from studies purporting to demonstrate that mandatory volunteering is a wise educational policy. Respondents' Brf. at 4-5. Petitioners could of course present studies to demonstrate that mandatory service is a terrible educational policy and the wrong way to teach young people about service. *See, e.g.*, Mark S. Sobus, *Mandating Community Service: Psychological Implications of Requiring Prosocial Behavior*, 19 Law & Psy. Review 153 (1995) (criticizing mandatory service programs as destructive of true charitable impulses). However, these policy disputes are entirely irrelevant to determining the program's constitutionality. This litigation is not about the merits of the school district's policy, but whether that policy traverses constitutional boundaries that protect individual liberties.

makes clear that this Court never has definitively resolved the question here. *Herndon, supra;* A-1-17. The Fourth Circuit noted that it was relying on dicta from this Court for its determination that parental liberty is a non-fundamental right. Moreover, the Fourth Circuit declared that the primary case relied upon by the school district, *Runyon v. McCrary*, 427 U.S. 160 (1976), in fact "did not decide how closely to scrutinize restriction of [parental liberty]." *Herndon*, 89 F.3d at 178-79; A-10.[3]

Furthermore, as the Reinhards set forth in their petition and as the Fourth Circuit acknowledged, the decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), did not address Fourteenth Amendment parental liberty rights "standing alone," and was rather a First Amendment free exercise case that peripherally mentioned the right of parents to direct their children's religious education at home. *Herndon*, 89 F.3d at 178; A-9-10. One commentator recently noted that

> because the Court analyzed the claims in *Yoder* under the First Amendment, it did not determine which of the current standards of review – rational relation, intermediate scrutiny, or strict scrutiny – would apply to a due process-based

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[3] Moreover, *Runyon* and *Murphey v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988), another case relied upon by the school district, do not involve "secular parental objections to the school curriculum," as alleged by the school district. Respondents' Brf. at 15 n.5. Rather, they addressed situations where parents were seeking to control their children's education at home without *any* governmental regulation. Of course, petitioners in the instant case do not argue that government can play no role in the education of their children, but rather challenge an overextension of governmental authority into the traditional realm of family decisionmaking.

> parental liberty claim. . . . Hence, the Court has never resolved which standard of review would apply to a claim grounded in that interest.

Miranda Perry (Note), *Kids and Condoms: Parental Involvement in School Condom Distribution Programs*, 63 U. Chi. L. Rev. 727, 735-36 (1996). *Runyon*, *Yoder*, and similar decisions merely reinforce petitioners' argument that the law of parental liberty is ambiguous and has led to conflicts among courts in interpreting the *Meyer-Pierce* line of cases.[4]

The school district correctly notes in another part of its brief that this Court's opinion in *Planned Parenthood of*

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[4] The school district and the Fourth Circuit are emphatically incorrect in asserting that non-religious objections to state regulation of educational matters are not cognizable under the Constitution. As the Reinhards set forth in their petition, the Fourteenth Amendment protects the right of parents from state intrusion into the education of their children whether or not the parents are religious or have specific religious objections to a program. Petition at 19 n.10. Perhaps the best example of the distinction between First Amendment religious liberty rights and Fourteenth Amendment parental liberty rights is *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Meyer*, the objection to state authority over educational matters was not religiously-based. Rather, the parents successfully vindicated their right to have their children learn foreign languages in public or private school without undue state interference. *See also Farrington v. Tokushige*, 273 U.S. 284 (1927) (Japanese parents vindicate Fourteenth Amendment right to educate children in schools tied to their cultural, as opposed to religious, heritage). Furthermore, while this Court in *Yoder* "made it clear that parents may lodge . . . objections under the First Amendment only when they are religiously based, nothing [in *Yoder*] states that parents could not bring nonreligious objections to state programs in other parts of the Constitution." Perry, 63 U. Chi. L. Rev. at 733.

Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), is the most recent statement concerning non-enumerated fundamental rights. Respondents' Brf. at 19. What the school district ignores, however, is that the *Casey* opinion recognized that "[o]ur law affords constitutional protection to personal decisions relating to . . . family relationships, child rearing, and *education*. . . . These matters . . . are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851 (emphasis added). Thus, contrary to the school district's contentions, this Court, "by continually acknowledging the importance of parental control and guidance and by referring to it as part of the right of privacy protected by the Fourteenth Amendment," consistently and strongly suggests that parental liberty rights are fundamental. *See* Perry, 63 U. Chi. L. Rev. at 736. This Court should grant the Reinhards' petition to resolve the uncertainty and conflicts in the law over the proper construction of parental liberty rights.[5]

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[5] Petitioners demonstrated the conflict between the Fourth Circuit's holding below and two recent decisions involving parental rights in the public school setting. *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (1995), *cert. denied*, 116 S.Ct. 753 (1996) and *Alfonzo v. Fernandez*, 606 N.Y.S.2d 259 (1993), *appeal dismissed without op.*, 614 N.Y.S.2d 388 (1994); Petition at 16-17. The school district in its opposition brief blatantly mischaracterizes the rulings in these cases, claiming that both cases involve issues outside of educational policy. However, the courts in these cases made clear that they were reviewing the condom distribution programs as part of a public school educational policy, not, as the school district contends, as a health policy. *See Curtis*, 652 N.E.2d at 584; *Alfonzo*, 606 N.Y.S. at 265-67. Moreover, both condom distribution programs and mandatory service programs represent instances of public schools going further than they have ever gone in the past, intruding into areas traditionally left to parental authority. Both

The school district also barely mentions the alternative to recognizing heightened protection for parental rights: relegating this right to non-fundamental status. The school district argues that even if educational requirements usurp parental authority, officials need only point to a "rational" educational objective in order for the program to be sustained. Respondents' Brf. at 18. As set forth in the petition, adoption of rational basis review for parental liberty claims will leave parents with no recourse. Petition at 20-21. Virtually any educational requirement could be justified on such entirely amorphous, but "reasonable" educational goals as strengthening the "ethics of social and civic responsibility" or recognizing "the contribution of different races, genders, and cultures." *See* A-61-62 (setting forth the educational interests or purposes of the mandatory community service program).[6] The primacy of the family under our

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programs also have little or no connection to the school curriculum; most condom distribution programs have some relation to a school district's interest in health education while the school district's service program has absolutely no connection to the classroom or traditional school curricula whatsoever. *See* Petition at 7 n.3; A-58, A-60. The Fourth Circuit's opinion in the instant case clearly conflicts with the holdings in *Curtis* and *Alfonzo* that parental liberty is a fundamental constitutional right.

[6] The Fourth Circuit notes that petitioners concede the "basic legitimacy" of these interests, but draws the wrong conclusion from this assertion. *See Herndon*, 89 F.3d at 179; A-11. While it may be true that the school district could legitimately further even these amorphous, "feel-good" educational interests in some fashion, the question is whether the means by which the school district chooses to fulfill these interests (coerced service to others over parental objection) is constitutional.

system of law simply does not allow such an incredibly deferential standard when governmental programs intrude into family matters.[7]

The Reinhards seek only to restore a right central to our Nation's history and traditions – the right of parents to have primary responsibility over the education of their children. Accordingly, the Reinhards urge this Court to grant their petition in order to determine whether

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[7] The school district raises a number of concerns about how parental rights would be recognized in the public school setting. *See* Respondents' Brf. at 17-18. It is at this point somewhat premature to address the standards and tests that should be used when parents claim that public school programs violate their right to direct their children's education. Before turning to how this right is to be construed in the public schools, this Court must first decide whether parents even have a fundamental right to direct their children's education. Moreover, the Fourth Circuit opinion applies with equal force to situations outside the public schools, primarily when state educational requirements violate parents' ability to send their children to private schools or educate them at home. Also, the school district's alarmist rhetoric about parental rights in the public schools is both hyperbolic and wrong. Parents could only challenge those programs that they could demonstrate violated their right to direct their children's education. Chief among these requirements would be to demonstrate that a particular program was coercive. *See Curtis*, 652 N.E.2d at 586 (recognizing parental liberty as fundamental, but rejecting parental challenge because program was not coercive; coercion "exists where governmental action is mandatory and provides no outlet for parents, such as where refusal to participate in a program results in a sanction or in expulsion," such as the program in the instant case). This Court should not allow the school district's absurd parade of horribles (Respondents' Brf. at 17-18) to distract from the overwhelming evidence from history and case law demanding that parental rights be protected.

parental liberty rights will be enforceable in modern educational disputes.

II. PERSONAL LIBERTY

The school district in the instant case has required an activity – volunteering – that throughout our Nation's history has been left to individual and family-decision-making. As petitioners previously have set forth (Petition at 22-25), the school district's program not only violates a fundamental principle of the common law, but also contradicts a freedom deeply rooted in this Nation's tradition of voluntary charity.

Nowhere does the school district attempt to respond to petitioners' argument concerning the centrality of voluntary charity to this Nation's history and traditions. Instead, the school district merely states that because deciding whether and under what circumstances to serve others does not appear on a "list" of protected freedoms set forth by this Court in *Casey*, such liberties should not be recognized. Respondents' Brf. at 19. However, as this Court consistently has held, fundamental rights do not derive from preconceived lists, but rather are those freedoms so deeply rooted in history and tradition as to merit recognition as fundamental freedoms. *See* Petition at 22. Deciding for oneself whether and how to serve others, without imposition of legal duties or government oversight, is a fundamental principle of Anglo-American law, a principle that the schools district eviscerates through its mandatory volunteering program. Petition at 22-26.

The school district also emphasizes that no court previously has recognized that individuals cannot be compelled by government to provide charitable service to

others. Respondents' Brf. at 19. A very good reason exists for the lack of case law on this issue: until the imposition of mandatory community service requirements, governments in this country never had imposed such duties on individuals. This Court should not without due consideration allow the setting of a dangerous precedent permitting governmental bodies, rather than individuals and families, to determine what obligations someone may owe to another.

The three historical examples provided by the school district to justify its program – required military service, mandatory road work, and jury duty – actually support petitioners' argument. Respondents' Brf. at 19. Throughout our nation's history, courts have recognized certain "civic duties" governments may impose on individuals. *See U.S. v. Kozminski*, 487 U.S. 931, 941 (1988) (setting forth "civic duty" exception to tradition of voluntary labor for laws deemed necessary for accomplishing specific public goals). However, the abiding principle of our Constitution is to limit the role of government in private affairs, not to serve as a basis of expansion of state-imposed obligations.

Furthermore, military service, jury duty, and required road work are narrow, historically-based duties individuals owe to the *State*. These duties were recognized at common law and courts did not impose constitutional restraints on governments if they chose to adopt these policies. *See Kozminski, supra.* In contrast, the school district's program, like a number of recently enacted programs, imposes an unprecedented duty on individuals to serve private parties, *i.e.* non-profit organizations and agencies in the community. The program is not founded upon any historical or common law tradition and indeed defies historical tradition. *See* Petition at 22-25.

Finally, the school district attempts to justify its program by pointing to its supposed educational benefits. Respondents' Brf. at 20. Any alleged benefit students may derive from coerced service to others is of course irrelevant to whether the program is constitutional. Educational officials cannot require young people to do anything they think may be good for them. Even more important, they cannot require students to perform an activity like volunteering that must spring from self-motivation, not from a state-imposed obligation. This Court should accept the Reinhards' petition in order to decide whether individuals will retain the right to determine whether and under what circumstances they will perform service to others.

CONCLUSION

For the reasons set forth in this reply brief and the petition for writ of certiorari, this Court should grant the writ filed by the Reinhard family.

Respectfully submitted,

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